COMMENTARIES

ON THE

L A W S

OF

ENGLAND.

BOOK THE SECOND.

THE SIXTH EDITION.

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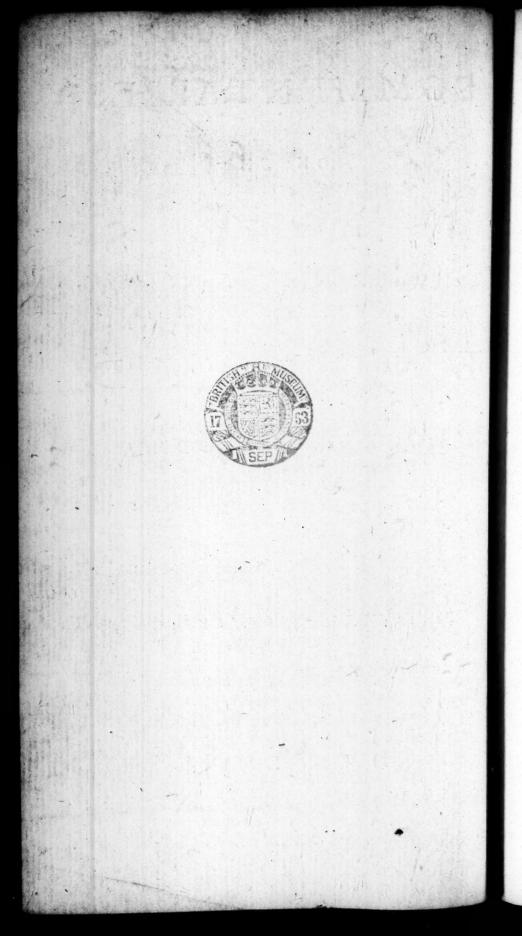
By SIR WILLIAM BLACKSTONE,

ONE OF HIS MAJESTY'S JUSTICES OF THE
HON. COURT OF COMMON PLEAS.

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Воок. П.

Of the RIGHTS of THINGS.

Снар. І.	
Of PROPERTY, in general,	Page 1.
CHAP. II.	
Of REAL PROPERTY; and first, of CORPOREAL HEREDITAMENTS.	16.
CHAP. III.	
Of Incorporeal Hereditaments,	20.
CHAP. IV.	
Of the FEODAL SYSTEM,	44
CHAP. V.	
Of the antient English Tenures.	59.

A 2 CHAP,

CHAP. VI.

Of the modern English Tenures.	78
CHAP. VII.	
Of FREEHOLD ESTATES, of INHERITANCE.	103
CHAP. VIII.	
Of Freeholds, not of Inheritance.	120
CHAP. IX.	
Of Estates, less than Freehold.	140
CHAP. X.	
Of ESTATES upon CONDITION.	152.
CHAP. XI.	
Of Estates in Possesion, Remainder, and Reversion.	163.
CHAP. XII.	
Of ESTATES in SEVERALTY, JOINT-TENANCY, COPARCENARY, and COMMON.	179.
CHAP. XIII.	# # +

Of the TITLE to THINGS REAL, in general.

CHAP.

195.

CHAP. XIV.	
Of TITLE by DESCENT.	200.
CHAP. XV.	1
Of TITLE by PURCHASE; and, first, by ESCHEAT.	241.
CHAP. XVI.	
Of TITLE by OCCUPANCY.	258.
CHAP. XVII.	
Of TITLE by PRESCRIPTION.	263.
CHAP. XVIII.	
Of TITLE by Forfeiture.	267.
CHAP XIX.	
Of TITLE by ALIENATION.	287.
CHAP. XX.	
Of ALIENATION by DEED.	295.
CHAP. XXI.	
Of ALIENATION by matter of RECORD.	344.
CHAP. XXII.	
Of ALIENATION by SPECIAL CUSTOM.	365.
CHAP. XXIII.	
Of ALIENATION by DEVISE.	373.
A 3 CH	AP.

C	H	A	P.	XXIV.

Of THINGS PERSONAL.

384.

CHAP. XXV.

Of PROPERTY in THINGS PERSONAL.

389.

CHAP. XXVI.

Of TITLE to THINGS PERSONAL, by OCCUPANCY. 400.

. CHAP. XXVII.

Of TITLE by PREROGATIVE, and FORFEITURE. 408.

CHAP. XXVIII.

Of TITLE by CUSTOM.

422.

471.

CHAP. XXIX.

Of TITLE by Succession, Marriage, and Judg-MENT. 430.

CHAP. XXX.

Of TITLE by GIFT, GRANT, and CONTRACT. 449.

CHAP. XXXI.

Of TITLE by BANKRUPTCY.

CHAP. XXXII.

Of TITLE by TESTAMENT, and ADMINISTRA-

APPPEN.

APPENDIX.

Page i. . No. I. Vetus Carta FEOFFAMENTI. No. II. A modern Conveyance by LEASE and RELEASE. ii. §. 1. LEASE or BARGAIN and SALE, for a Year. iii. 6. 2. Deed of RELEASE. No. III. An OBLIGATION, or BOND, with CONDITION xiii. for the Payment of Money. No. IV. A FINE of Lands, fur Cognizance de Droit, come ceo, &c. xiv. 1. 1. Writ of Covenant, or PRAECIPE. xiv. 5. 2. The Licence to agree. ibid. ibid. 9. 3. The Concord. 4. The Note, or Abstract. xv. §. 4. The Foot, Chirograph, or Indentures of the FINE. ibid. §. 6. Proclamation, endorsed upon the FINE, according to the Statutes. xvi. No. V. A common RECOVERY of Lands, with double Voucher. XVII. 5. 1. Writ of Entry, fur Diffeisin in the Post; or PRAECIPE. xvii.

§. 2. Exemplification of the RECOVERY Roll.

ibid.

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COMMENTARIES

ONTHE

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BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER THE FIRST.

OF PROPERTY, IN GENERAL.

HE former book of these commentaries having treated at large of the jura personarum, or such rights and duties as are annexed to the persons of men, the objects of our enquiry in this second book will be the jura rerum, or, those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of dominion, or property, concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

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THERE is nothing which fo generally frikes the imagination, and engages the affections of mankind, as the right of property: or that fole and despotic dominion which one man claims and exercifes over the external things of the world, in total exclusion of the-right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the poffession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title, or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and firially speaking) there is no foundation in nature or in natural law, why a fet of words upon parchment should convey the dominion of land; why the fon should have a right to exclude his fellow creatures from a determinate fpot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These enquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without fcrutinizing too nicely into the reasons of making them. But, when law is to be confidered not only as matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of fociety.

In the beginning of the world, we are informed by holy writ, the all bountiful Creator gave to man "dominion over all "the earth; and over the fish of the sea, and over the sowl of the air, and over every living thing that moveth upon the "earth."

"earth (a)." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose, that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

THESE general notions of property were then fufficient to answer all the purposes of human life; and might perhaps still have answered them, had it been possible for mankind to have remained in a state of primæval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the antient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein " erant omnia communia et indivisa omnibus, veluti " unum cunctis patrimonium effet (b)." Not that this communion of goods feems ever to have been applicable, even in the earlieft ages, to aught but the substance of the thing; nor could it be extended to the use of it. For, by the law of nature and reason, he who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer (c): or, to speak with greater precision, the right of possession continued for the same time only that the act of pos-Thus the ground was in common, and no part fession lasted. of it was the permanent property of any man in particular: yet whoever was in the occupation of any determinate spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature, to have driven him by force; but the

⁽a) Gen. i. 28. (b) Justin, l. 43. c. 1. (c) Barbeyr. Pust. l. 4 c. 4.

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the instant that he quitted the use or occupation of it, another might seise it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own. (d).

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and difturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, fo long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; --- if, as foon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beafts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would facrifice their lives to preferve them. Hence a property was foon established in every man's house and home-stall; which seem to have been originally mere temporary huts or moveable cabins,

⁽d) Demadmodum theatrum, cum esse eum locum quem quisque ocenpurit, commune sit, recte tamen dici potest, ejus. De Fin. l. 3. c. 20.

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fuited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be sit for use, till improved and meliorated by the bodily labour of the occupant: which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

THE article of food was a more immediate call, and therefore a more early confideration. Such, as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds, in order to fustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of water also a very important point. And therefore the book of Genefis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in fuch places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, afferting his right to a well in the country of Abimelech, and exacting an oath for his fecurity, "because "he had dug that well (e)." And Isaac, about ninety years afterwards,

⁽e) Gen. xxi. 30.

terwards, re-claimed this his father's property; and after much contention with the Philistines, was suffered to enjoy it in peace (f).

ALL this while the foil and pasture of the earth remained still in common as before and open to every occupant; except perhaps in the neighbourhood of towns, where the necessity of a fole and exclusive property in lands (for the fake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to feife upon and occupy fuch other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was univerfal in the earliest ages; and which Tacitus informs us continued among the Germans till the decline of the Roman empire (g). We have also a striking example of the same kind in the history of Abraham and his nephew Lot (h). When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was that a strife arose between their servants; fo that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: "let "there be no strife, I pray thee, between thee and me. Is " not the whole land before thee? Separate thyself, I pray " thee, from me. If thou wilt take the left hand, then I will " go to the right; or if thou depart to the right hand, then I " will go to the left." This plainly implies an acknowleged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes. " And Lot lifted up " his eyes, and beheld all the plain of Jordan, that it was well " watered every where, even as the garden of the Lord. Then " Lot chose him all the plain of Jordan, and journeyed eaft; " and Abraham dwelt in the land of Canaan."

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⁽f) Gen. xxvi. 15, 18, &c. (g) Colunt discreti et diversi; ut sons ut campus, ut nemus placuit. De mor. Germ. 16. (h) Gen. c. xiii.

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Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother-country was overcharged with inhabitants; which was practised as well by the Phoenicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising on countries already peopled, and driving out or massacring the innocent and desenceles natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and, by constantly occupying the same individual spot, the fruits of the earth were confumed, and its spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connexion and consequence, introduced and established the idea of a more permanent property in the foil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in fufficient quantities, without the affistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seise upon and enjoy the product of his industry, art, and labour? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to fome philosophers, is the genuine state of nature. Whereas now (so graciously has

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has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its rational faculties, as well as of exerting its natural. Necessity begat property: and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

THE only question remaining is, how this property became actually vested; or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to every body, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the fubstance of the earth itself; which excludes every one else but the owner from the use of it. There is indeed fome difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf infifting, that this right of occupancy is founded upon a tacit and implied affent of all mankind, that the fuf occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no fuch implied affent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour, is from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement! However, both fides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man feifing to his own continued use such spots of ground as he found most agreeable

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agreeable to his own convenience, provided he found them unoccupied by any one elfe.

PROPERTY, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till fuch time as he does some other act which shews an intention to abandon it: for then it becomes, naturally speaking, publici juris once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the fea or a public highway, this is fuch an express dereliction, that a property will be vested in the first fortunate finder that will feife it to his own use. But if he hides it privately in the earth, or other fecret place, and it is discovered, the finder acquires no property therein; for the owner hath notby this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he defigned to quit the possesfion; and therefore in fuch case the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure trove (i).

But this method, of one man's abandoning his property, and another's seising the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which may be considered either as a continuance

⁽i) SeeVol. I. pag. 285.

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continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner. and an immediate fuccessive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himfelf, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property; and Titrus, being the only or first man acquainted with such my intention, immediately steps in and seises the vacant possession: thus the consent expressed by the conveyance gives Titins a good right against me; and possession, or occupancy, confirms that right against all the world besides.

THE most universal and effectual way, of abandoning property, is by the death of the occupant: when, both the actual possession and intention of keeping possession ceasing, the property, which is founded upon such possession and intention, ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: elfe, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their difposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, confidering men as absolute individuals, and unconnected with civil fociety: for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, fuch a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of fecondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the

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the country then steps in, and declares who shall be the suctestor, representative, or heir of the deceased; that is, who
alone shall have a right to enter upon this vacant possession,
in order to avoid that confusion, which its becoming again
common would occasion (k). And farther, in case no testament
be permitted by the law, or none be made, and no heir can be
found so qualified as the law requires, still, to prevent the robustitle of occupancy from again taking place, the doctrine of
escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority,
are the ultimate heirs, and succeed to those inheritances, to
which no other title can be formed.

THE right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its fide; yet we often miftake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself was no natural, but merely acivil right. It is true, that the transmission of one's posleffions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the pasions on the fide of duty, and prompts a man to deferve well of the public, when he is fure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affectims. Yet, reasonable as this foundation of the right of inheitance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined; and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relaions are usually about him on his death-bed, and are the

⁽k) It is principally to prevent any vacancy of possession, that he civil law considers father and son as one person; so that upon he death of either the inheritance does not so properly descend, as ontinue in the hands of the survivor. Ff. 28. 2. 11.

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earliest witnesses of his decease. They became therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And there fore also in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring, that "fince God had given him no seed, his steward Eliezer, one born in his house, was his heir (1)."

WHILE property continued only for life, testaments were useless and unknown; and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs a law were incapable of exclusion by will. Till at length it was found, that fo strict a rule of inheritance made heirs disobedient and head-strong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by testament; that is, by written or oral instructions properly witnessed and authenticated, accordings the pleasure of the deceased; which we therefore emphatically style his will. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one third of his moveables from his wife and children: and, in general, no will was permitted of lands till the reign of Henry the eighth; and then only of certain portion: for it was not till after the restoration that the power of devising real property became so universal as at prefent.

WILLS therefore and testaments, rights of inheritance and fuccessions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid: neither does any thing vary more than the right of inheritance under different national

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national establishments. In England particularly, this diverity is carried to such a length, as if it had been meant to point
out the power of the laws in regulating the succession to property, and how sutile every claim must be, that has not its
soundation in the positive rules of the state. In personal estates
the father may succeed to his children; in landed property he
never can be their immediate heir, by any the remotest possibility: in general only the eldest son, in some places only the
roungest, in others all the sons together, have a right to sucteed to the inheritance: in real estates males are preferred to
semales, and the eldest male will usually exclude the rest; in
the division of personal estates, the semales of equal degree are
admitted together with the males, and no right of primogeniture is allowed.

This one confideration may help to remove the scruples of hany well-meaning persons, who set up a mistaken conscience n opposition to the rules of law. If a man disinherits his son, y a will duly executed, and leaves his estate to a stranger, here are many who confider this proceeding as contrary to latural justice; while others fo scrupulously adhere to the upposed intention of the dead, that if a will of lands be atefted by only two witnesses instead of three, which the law reuires, they are apt to imagine that the heir is bound in concience to relinquish his title to the devisee. But both of them tertainly proceed upon very erroneous principles: as if, on the me hand, the fon had by nature a right to succeed to his faher's lands; or as if, on the other hand, the owner was by lature intitled to direct the succession of his property after his wn decease. Whereas the law of nature suggests, that on he death of the possession the estate should again become comnon, and be open to the next occupant, unless otherwise orered for the take of civil peace by the positive law of society. The positive law of society, which is with us the municipal aw of England, directs it to vest in such person as the last coprietor shall by will, attended with certain requisites, apoint; and, in defect of fuch appointments, to go to some articular person, who, from the result of certain local constitutions,

stitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed: and, where the necessary requisites are omitted, the right of the heir is equally strong and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

But, after all, there are some few things, which notwith. flanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an ufufructuary property is capable of being had: and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills and other conveniences: fuch also are the generality of those animals which are faid to be feræ naturæ, or of a wild and untameable disposition; which any man may feife upon and keep for his own use or pleasure. All these things, so long as the remain in possession, every man has a right to enjoy without diffurbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common flock, and any man else has an equal right to seife and enjoy them afterwards.

AGAIN: there are other things, in which a permanent property may subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands: such also are wrecks, estrays, and that species of wild animals, which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some

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CHAPTER

water introduction content of about the requiries of this freder of property by first account by, the law hos than fore without up the rect of difference by volting the thingerhous-

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OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

THE objects of dominion or property are things, as contradiftinguished from persons: and things are by the law of England distributed into two kinds; things real, and things personal. Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place; as lands and tenements: things personal are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go.

In treating of things real, let us consider, first, their several forts or kinds; fecondly, the tenures by which they may be holden; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and lofing it.

FIRST, with regard to their feveral forts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. Land comprehends all things of a permanent, fubstantial nature; being a word of a very extensive signification, as will presently appear more at large. Tenement is a word of still greater extent; and though in its vulgar acceptation it is only applied to houses

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houses and other buildings, yet in its original, proper, and legal sense it fignifies every thing that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus liberum tenementum, franktenements or freehold, is applicable not only to lands and other folid objects, but also to offices, rents, commons, and the like (a): and, as lands and houses are tenements, fo is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements (b). But an hereditament, fays fir Edward Coke (c), is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatfoever may be inherited, be it corporeal, or incorporeal, real, personal, or mixed. Thus an heir loom, or implement of furniture which by custom descends to the heir together with an house, is neither land, nor tenement, but a mere moveable; yet, being inheritable, is comprized under the general word, hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament (d).

HEREDITAMENTS then, to use the largest expression, are of two kinds, corporeal, and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

CORPOREAL hereditaments confift wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For land, says fir Edward Coke (e), comprehended in its legal signification any ground, soil, or earth whatsoever: as arable, meadows, pastures, woods, moors, waters, marishes, furzes, and heath. Vol. II.

⁽a) Co. Litt. 6. (b) Ibid. 19, 20. (c) 1 Inft. 6 (d) 3 Rep. 2. (e) 1 Inft. 4.

It legally includeth also all castles, houses, and other build. ings: for they confift, faith he, of two things; land, which is the foundation, and fructure thereupon: fo that, if I convey the land or ground, the structure or building passeth therewith. It is observable that water is here mentioned as a species of land, which may feem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water, by the name of water only: either by calculating its capacity. as, for fo many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water (f). For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; fo that I can only have a temporary, transient, usufructuary property therein: wherefore if a body of water runs out of my pond into another man's. I have no right to reclaim it. But the land, which that water covers is permanent, fixed, and immoveable: and therefore in this I may have a certain, substantial property; of which the law will take notice, and not of the other.

LAND hath also, in its legal signification, an indefinite extent, upwards as well as downwards. Cujus est solum, ejus est usque ad coelum, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant

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his his vs. Hiy a ant grant of which, nothing passes but a right of fishing (g): but the capital distinction is this; that by the name of a castle, messuage, tost, crost, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of: but by the name of land, which is nomen generalissimum, every thing terrestrial will pass (h).

(g) Co. Litt. 4.

(h) Ibid. 4, 5, 6.

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CHAPTER THE THIRD.

OF INCORPOREAL HEREDITAMENTS.

N incorporeal hereditament is a right iffuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercifible within, the fame (a). It is not the thing corporate itself, which may confift in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In fhort, as the logicians speak, corporeal hereditaments are the fubstance, which may be always feen, always handled: incorporeal hereditaments are but a fort of accidents, which inhere in and are supported by that fubstance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily fenses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them,

(a) Co. Litt. 19, 20.

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as the tenth sheaf or tenth lamb, seem to be completely corporeal: yet they are indeed incorporeal hereditaments: for they, being merely a contingent right, collateral to or issuing out of lands, can never be the object of sense: they are neither capable of being shewn to the eye, nor of being delivered into bodily possession.

INCORPOREAL hereditaments are principally of ten forts; advowfons, tithes, commons, ways, offices, dignities, franchifes, corodies, or penfions, annuities, and rents.

I. ADVOWSON is the right of presentation to a church or ecclesiastical benefice. Advowson, advocatio, signifies in clientelam recipere, the taking into protection; and therefore is synonimous with patronage, patronatus: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesses, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common (from whence, as was formerly mentioned (b), arose the division of parishes) the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualisied) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the patron (c).

This instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages; but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight, nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man

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⁽b) Vol. I. pag. 109. (c) This original of the jus patronatus, by building and endowing the church, appears also to have been allowed in the Roman empire. Nov. 56. 1. 12. c. 2. Nov. 118. c. 23.

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by any visible bodily transfer, nor can corporal possession be had of it. If the patron takes corporal possession of the church, the church-yard, the glebe or the like, he intrudes on another man's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by verbal grant, either oral or written, which is a kind of invisible, mental transfer: and being so vested, it lies dormant and unnoticed, till occasion calls it forth: when it produces a visible, corporeal fruit, by intitling some clerk, whom the patron shall please to nominate, to enter and receive bodily possession of the lands and tenements of the church.

ADVOWSONS are either advowsons appendant, or advowsons in gross. Lords of manors being originally the only founders, and of course the only patrons, of churches (d), the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson appendant (e): and it will pass, or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words (f). But where the property of the advowson has been once separated from the property of the manor, by legal conveyance, it is called an advowson in gross, or at large, and never can be appendant any more; but is for the future annexed to the person of its owner, and not to his manor or lands (g).

Advowsons are also either presentative, collative, or donative (h). An advowson presentative is where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified: and this is the most usual advowson. An advowson collative is where the bishop and patron are one and the same person: in which case the bishop cannot present

⁽d) Co. Litt. 119. (e) Ibid. 121. (f) Ibid 307. (g) Ibid. 120. (h) Ibid.

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present to himself; but he does by the one act of collation, or conferring the benefice, the whole that is done in common cases, by both prelentation and institution. An advowson donative is when the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his vifitation only, and not to that of the ordinary; and vested abfolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (i). This is said to have been antiently the only way of conferring ecclefiaftical benefices in England; the method of institution by the bishop not being established more early than the time of archbishop Becket in the reign of Henry II. (j). And therefore though pope Alexander III (k), in a letter to Becket, feverely inveighs against the prava confuetudo, as he calls it, of investiture conferred by the patron only; this however shews what was then the common usage. Others contend, that the claim of the bishops to institution is as old as the first planting of christianity in this island; and in proof of it they allege a letter from the English nobility to the pope in the reign of Henry the third, recorded by Mathew Paris (1), which speaks of presentation to the bishop as a thing immemorial. The truthfeems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavoured to introduce a kind of feodal dominion over ecclefiastical benefices, and, in consequence of that, began to claim and exercise the right of institution univerfally as a species of spiritual investiture.

However this may be, if, as the law now stands, the true patron once waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the advow-

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⁽i) Co. Litt. 341. (j) Seld. tith. c. 12. §. 2. (k) Decretal. l. 3. t. 7. c. 3. (l) A. D. 1239.

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fon is now become for ever presentative, and shall never be donative any more (m). For these exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom fuch peculiar right refides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will thereupon reduce it to the standard of other ecclefiaftical livings.

II. A SECOND species of incorporeal hereditaments is that of tithes; which are defined to be the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called predial, as of corn, grass, hops, and wood (n); the second mixed, as of wool, milk, pigs, &c. (o), confisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross: the third personal, as of natural occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due (p).

IT is not to be expected from the nature of these general commentaries, that I should particularly specify, what things are tithable, and what not, the time when, or the manner and proportion in which, tithes are usually due. For this I must refer to such authors as have treated the matter in detail: and shall only observe, that, in general, tithes are to be paid for every thing that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like; but not for any thing that is of the substance of the earth, or is not of annual increase, as stone, lime, chalk, and the like; nor for creatures that are of a wild nature, or ferae naturae, as deer, hawks, &c. whose increase, so as to profit the owner, is not annual, but casual (q). It will rather be our business to confider, 1. The original of the right of tithes. 2. In whom

⁽n) 1 Roll. Abr. 635. (m) C. Litt. 344. Cro. Jac. 63. 2 Inft. 649. (p) 1 Roll. Abr. 656. (o) Ibid. Inft. 651.

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that right at present subsists. 3. Who may be discharged, either totally or in part, from paying them.

1. As to their original. I will not put the title of the clergy to tithes upon any divine right; though fuch a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, jure divino; whatever the particular mode of that maintainance may be. For, besides the positive precepts of the new testament, natural reafon will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the fake of the rest of mankind, have a right to be furnished with the necessaries, conveniences, and moderate enjoyments of life, at their expense, for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priefts or clergy: ours in particular have established this of tithes, probably in imitation of the jewish law: and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatfoever, unacknowleged and unsupported by temporal fanctions.

We cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were cotemporary with the planting of christianity among the Saxons, by Augustin the monk, about the end of the sixth century. But the first mention of them, which I have met with in any written English law, is in a constitutional decree, made in a synod held A. D. 786 (r), wherein the payment of tithes in general is strongly enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two singdoms of the heptarchy, in their parliamentary conventions.

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(r) Selden, c. 8. §. 2

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of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators, and people. Which was a few years later than the time that Charlemagne established the payment of them in France (s), and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy (t).

THE next authentic mention of them is in the fædus Edcoardi et Guthruni; or the laws agreed upon between king
Guthrun the Dane, and Alfred and his son Edward the elder,
successive kings of England, about the year 900. This was a
kind of treaty between those monarchs, which may be found
at large in the Anglo-Saxon laws (u): wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence
of the christian clergy under his dominion; and, accordingly,
we find (w) the payment of tithes not only enjoined, but a penalty added upon non-observance: which law is seconded by
the laws of Athelstan (x), about the year 930. And this is
as much as can certainly be traced out, with regard to their
legal original,

2. WE are next to consider the persons to whom they are due. And upon the first introduction (as hath formerly been observed) (y) though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased (z); which were called arbitrary consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common (a). But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first by common consent, or the appointments of lords of manors, and afterwards by the written law of the land (b).

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⁽s) A. D. 778. (t) Book I. ch. 11. Seld. c. 6. § 7. Sp. o laws, b. 31. c. 12. (u) Wilkins, pag. 51. (w) cap. 6 (x) cap. 1. (y) Book I. Introd. §. 4. (z) 2 Intl. 64 Hob. 296. (a) Seld. c. 9 §. 4. (b) LL. Edgar, c. 18 2. Canut. c. 11.

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However, arbitrary confecrations of tithes took place again afterwards, and became in general use till the time of king John (c). Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules under arch-bishop Dunstan and his successors; who endeavoured to wean the people from paying their dues to the fecular or parochial clergy, (a much more valuable fet of men than themselves) and were then in hopes to have drawn, by fanctimonious pretences to extraordinary purity of life, all ecclefiaftical profits to the coffers of their own societies. this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes fomewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected: fince, for this donation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever fung for his foul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by pope Innocent the third (d) about the year 1200 in a decretal epiftle, fent to the arch-bishop of Canterbury, and dated from the palace of Lateran: which has occasioned fir Henry Hobart and others to mistake it for a decree of the council of Lateran held A. D. 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen (e); whereas this letter of pope Innocent to the arch-bishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries (f). This epiftle, fays fir Edward Coke (g), bound not the lay subjects of this realm, but, being reasonable and just

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⁽c) Selden, c. II. (d) Opera Innocent. III. tom. 2. pag. 452. (e) Decretal. 1. 3. 1. 30. 6. 19. (f) Ibid. c. 26. (g) 2. In extraper chief places the king, by his royal prerogat

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(and, he might have added, being correspondent to the antient law) it was allowed of, and so became lex terra. This put an effectual stop to all the arbitrary consecrations of tithes; except some footsteps which still continue in those portions of tithes, which the parson of one parish hath, though rarely, a right to claim in another: for it is now universally held (h), that tithes are due, of common right, to the parson of the parish, unless there be a special exemption. This parson of the parish, we have formerly seen (i), may be either the actual incumbent, or else the appropriator of the benefice: appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy, by way of substitution to arbitrary consecrations of tithes (k).

3. WE observed that tithes are due to the parson of common right, unless by special exemption: let us therefore see, thirdly, who may be exempted from the payment of tithes, and how. Lands, and their occupiers, may be exempted or discharged from the payment of tithes, either in part or totally, first, by a real composition; or, secondly, by custom or prescription.

FIRST, a real composition is when an agreement is made between the owner of the lands, and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recompense given to the parson, in lieu and satisfaction thereof (1). This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general, and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectuals and hence have arisen all such compositions as exist at this day by force of the common law. But, experience shewing that

⁽h) Regist. 46. Hob. 296. (i) Book I. pag. 372. (k) In extraparochial places the king, by his royal prerogative, has a right to all the tithes. See book I. p. 110. (l) 2 Inst. 490. Regist. 38. 13 Rep. 40.

even this caution was ineffectual, and the possessions of the church being, by this and other means, every day diminished. the disabling statute 13 Eliz. c. 10. was made; which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches. other than for three lives or twenty one years. So that now, by virtue of this statute, no real composition made since the 13Eliz. is good for any longer term than three lives or twenty one years, though made by confent of the patron and ordinary: which has indeed effectually demolished this kind of traffick; fuch compositions being now rarely heard of, unless by authority of parliament.

SECONDLY, a discharge by custom or prescription is where time out of mind fuch perfons or fuch lands have been, either partially or totally, discharged from the payment of tithes. And this immemorial usage is binding upon all parties; as it is in its nature an evidence of universal consent and acquiescence. and with reason supposes a real composition to have been formerly made. This custom or prescription, is either de modo decimandi, or de non decimando.

A modus decimandi, commonly called by the simple name of a modus only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as twopence an acre for the tithe of land: fometimes it is a compenfation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in confideration of the owner's making it for him: fometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in flort, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a modus decimandi, or special manner of tithing. (ra) t Kee Cor oT : 19 Con Like 446 Sats, cet

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To make a good and fufficient modus, the following rules must be observed. 1. It must be certain and invariable (m). for payment of different fums will prove it to be no module that is, no original real composition; because that must have been one and the same, from its first original to the present time. 2. The thing given, in lieu of tithes, must be beneficial to the parson, and not for the emolument of third persons only (n): thus a modus, to repair the church in lieu of tithes is not good, because that is an advantage to the parish only; but to repair the chancel is a good modus, for that is an advantage to the parson. 3. It must be something different from the thing compounded for (o): one load of hay, in lieu of all tithe hav, is no good modus: for no parfon would, bona fide, makea composition to receive less than his due in the same species of tithe; and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a modus for another (p). Thus a modus of rd. for every milch cow will discharge the tithe of milch kine, but not of barren cattle: for tithe is of common right, due for both; and therefore a modur for one shall never be a discharge for the other. compense must be in its nature as durable as the tithes discharged by it; that is, an inheritance certain (q): and therefore a modus that every inhabitant of a house shall pay 4d. a year, in lieu of the owner's tithes, is no good modus; for possibly the house may not be inhabited, and then the recompense will be lost. 6. The modus must not be too large, which in law is called a rank modus: as if the real value of the tithes be 601. per annum, and a modus is fuggested of 401. this modus will not be good; though one of 40s. might have been valid (r). For, in thele cases of prescriptive or customary modus's, the law supposes an original real composition to have been regularly made; which being loft by length of time, the immemorial usage is admitted

⁽m) 1 Keb. 602. (n) 1 Roll. Abr. 649. [sixe] (b) Let. 179. (p) Cro. Eliz. 445. Salk. 657. (q) 2 P. Wms. 462. (r) 11 Mod. 60.

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ev. ms. as evidence to shew that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the law to commence from the reign of Richard the first (s); and any custom may be destroyed by evidence of its non-existence in any part of the long period from his days to the present: wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the modus set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the first, this modus is felo de se, and destroys itself. For, as it would be destroyed by any direct evidence to prove its non-existence at any time since that æra, so also it is destroyed by carrying in itself this internal evidence of a much later original.

A PRESCRIPTION de non decimando is a claim to be enfirely discharged of tithes, and to pay no compensation in lieu of them... Thus the king by his prerogative is discharged from all tithes (t). So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for ecclefia decimas non folvit ecclehae (u). But these privileges are personal to both the king and the clergy; for their tenant or leffee shall pay tithes of the fame land, though in their own occupation it is not tithable. And, generally speaking, it is an established rule, that, in lay hands, modus de non decimando non valet (w). But spiritual persons or corporations, as monasteries, abbots, bishops and the like, were always capable of having their lands totally discharged of tithes, by various ways (x): as, 1. By real composition: 2. By the pope's bull of exemption: 3. By unity of possession; as when the rectory of a parish and lands in the fame parish, both belonged to a religious house, those lands

(x) Hob. 309. Cro. Jac. 308.

⁽s) This rule was adopted, when by the statute of Westm. 1. (3 Edw. I. c. 39.) the reign of Richard I. was made the time of limitation in a writ of right. But, fince by the statute 32 Henry VIII. c. 2. this period (in a writ of right) hath been very rationally reduced to fixty years, it seems unaccountable, that the date of legal prescription or memory should still continue to be reckoned from an aera so very antiquated. See 2. Roll. Abr. 269 pl. 16. (t) Cro. Eliz. 511. (u) Ibid. 479. (w) Ibid. 511.

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were discharged of tithes by this unity of possession: 4. By prescription; having never been liable to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights, templars, ciftercians, and others, whose lands were privileged by the pope with a discharge of tithes (y). Though, upon the diffolution of abbeys by Henry VIII. most of these exemptions from tithes would have fallen with them, and the lands became tithable again; had they not been supported and upheld by the statute 31 Hen. VIII. c. 13, which enacts, that all persons who should come to the possession of the lands of any abbey then disfolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them. And from this original have forung all the lands, which, being in lay hands, do at present claim to be tithe-free: for, if a man can shew his lands to have been fuch abbey lands, and also immemorially difcharged of tithes by any of the means before-mentioned, this is now a good prescription de non decimando. But he must flew both these requisites: for abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription de non decimando avail in total discharge of tithes, unless it relates to such abbey lands.

III. COMMON, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; or to feed his beafts, to catch fish, to dig turf, to cut wood, or the like (z). And hence common is chiefly of four forts; common of pasture, of piscary, of turbary, and of estrovers.

another's land; for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross (a).

COMMON

⁽y) 2 Rep. 44. Seld. tith. c. 13. §. 2. (z) Finch. law. 157. (a) Co. Litt. 122.

COMMON appendant is a right, belonging to the owners or occupiers of arable land, to put commonable beafts upon the lord's waste, and upon the lands of other persons within the fame manor. Commonable beafts are either beafts of the plough, or fuch as manure the ground. This is a matter of most universal right: and it was originally permitted (b), not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for fervices either done or to be done, these tenants could not plough or manure the land without beafts; these beafts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident, to the grant of the lands; and this was the original of common appendant: which obtains in Sweden, and the other northern kingdoms, much in the fame manner as in England (c). Common appurtenant is where the owner of land has a right to put in other beafts, befides fuch as are generally commonable, as hogs, goats, and the like, which neither plough nor manure the ground. This, not arising from the necessity of the thing, like common appendant, is therefore not of common right; but can only be claimed by immemorial usage and prescription (d), which the law esteems sufficient proof of a special grant or agreement for this pur-Common because of vicinage, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beafts of the one straying mutually into the other's fields, without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may enclose and bar out the other, though they have intercommoned time out of mind. Neither hath my person of one town a right to put his beasts originally into the

(b)2 Inst. 86. (c)Stiernh. de jure Suconum 1. 2. c. 6. (d)
Co. Litt. 122.

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the other's common; but if they escape, and stray thither of themselves, the law winks at the trespass (e). Common in gross, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed: or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

ALL these species, of pasturable common, may be and usually are limited as to number and time; but there are also commons without stint, and which last all the year. By the statute of Merton however, and other subsequent statutes (f) the lord of a manor may enclose so much of the waste as he pleases, for tillage or woodground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called in law "approving;" an antient expression signifying the same as "improving (g)." The lord hath the sole interest in the soil; but the interest of the lord and commoner, in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord for the public injury, and each commoner for his private damage (h).

2, 3. COMMON of piscary is a liberty of fishing in another man's water; as common of turbary is a liberty of digging turf upon another's ground (i). There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects; though in one point they go much farther: common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and the rest, are a right of carrying away the very soil itself.

4. COM-

⁽e) Co. Litt. 122. (f) 20 Hen. III. c. 4. 29 Geo. II. c. 36. and 31 Geo. II. c. 41. (g) 2 Intt. 474. (h) 9 Rep. 113. (i) Co. Litt. 122.

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4. COMMON of eltovers (from eftoffer, to furnish) is a liberty of taking necessary wood, for the use or furniture of a
house or farm, from off another's estate. The Saxon word,
hote, is of the same signification with the French estovers;
and therefore house-bote is a sufficient allowance of wood, to
epair, or to burn in, the house; which latter is sometimes
alled fire-bote: plough-bote and cart-bote are wood to be
imployed in making and repairing all instruments of husbaniry: and hay-bote or hedge-bote is wood for repairing of
hays, hedges, or fences. These botes or estovers must be
easonable ones; and such any tenant or lesse may take off
he land let or demised to him, without waiting for any leave,
stignment, or appointment of the lessor, unless he be retrained by special covenant to the contrary (k).

THESE several species of commons do all originally result from the same necessity as common of pasture, viz. for the naintenance and carrying on of husbandry; common of pisary being given for the sustenance of the tenant's family; ommon of turbary and sire-bote for his suel; and house-ote, plough-bote, cart-bote, and hedge-bote, for repairing is house, his instruments of tillage, and the necessary fences of his grounds.

IV. A FOURTH species of incorporeal hereditaments is that if ways; or the right of going over another man's ground. Speak not here of the king's highways, which lead from own to town; nor yet of common ways, leading from a vilage into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be grounded on a special pernission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person

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fon in his company (1). A way may be also by prescription: as if all the owners and occupiers of fuch a farm have immemorially used to cross another's ground: for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land may clearly be created. A right of way may also arise by act and operation of law: for, if a man grants me a piece of ground in the middle of his field: heat the fame time tacitly and impliedly gives me a way to come at it; and I may cross his land for that purpose without tref. pass (m). For when the law doth give any thing to one, it giveth impliedly whatfoever is necessary for enjoying the fame (n). By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased: which was the established rule in public as well as private ways. And the law of England, in both cases, seems to correspond with the Roman (o).

V. Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments: whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleafure only: fave only that offices of public truft cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators (p). Neither can any judicial office be granted in reversion; because, though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient; but ministerial offices may be so granted (q); for those may be executed by deputy. Also, by statute 5 and 6 Edw. VI.c. 16. no public office shall be fold, under pain of disability to dispose of or hold it. For the law presumes that he, who buys

⁽n) Co Litt. 56 (i) Finch. law, 31. (m) Ibid. 63.

⁽o) Lord Raym. 725. 1 Brownl 212. 2 Show. 28. 1 Jon. 297. (p) 9 Rep. 97. (q) 11 Rep. 4.

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in office, will by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public.

VI. DIGNITIES bear a near relation to offices. Of the nature of these we treated at large in the former book (r): it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

VII. FRANCHISES are a seventh species. Franchise and sberty are used as synonimous terms: and their definition s (s), a royal privilege, or branch of the kings prerogative, ubsisting in the hands of a subject. Being therefore derived som the crown, they must arise from the king's grant; or, in some cases, may be held by prescription, which, as has been requently said, presupposes a grant. The kinds of them are arious, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic: in one man, or a many: but the same identical franchise, that has before een granted to one, cannot be bestowed on another; for that would prejudice the former grant (t).

To be a county palatine is a franchise, vested in a number spersons. It is likewise a franchise for a number of persons o be incorporated, and subsist as a body politic, with a ower to maintain perpetual succession and do other corporate cless and each individual member of such corporation is also aid to have a franchise or freedom. Other franchises are, to hold a court leet: to have a manor or lordship; or, at east, to have a lordship paramount: to have waifs, wrecks, strays, treasure-trove, royal-sish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and rying causes: to have the cognizance of pleas; which is still greater liberty, being an exclusive right, so that no ther court shall try causes arising within that jurisdiction: to ave a bailiwick, or liberty exempt from the sherist of the ounty; wherein the grantee only, and his officers, are to

⁽r) See book. I. ch. 12. (s) Finch. L. 164. (t) 2 Roll. br. 191. Keilw. 196.

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execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, a at bridges, wharfs, and the like; which tolls must have are sonable cause of commencement, (as in consideration of repairs, or the like) else the franchise is illegal and void (u): of lastly, to have a forest, chase, park, warren, or sistery endowed with privileges of royalty; which species of franchise may require a more minute discussion.

As to a forest: this, in the hands of a subject, is proper the same thing with a chase; being subject to the commo law, and not to the forest laws (v). But a chase differs from a park, in that it is not enclosed, and also that a man m have a chase in another man's ground as well as his own; by ing indeed the liberty of keeping beafts of chase or royal gam therein, protected even from the owner of the land, with power of hunting them thereon. A park is an enclosed chall extending only over a man's own grounds. The word par indeed properly fignifies any enclosure; but yet it is not ever field or common, which a gentleman pleases to surround wit a wall or pailing, and to stock with a herd of deer, that thereby constituted a legal park: for the king's grant, or least immemorial prescription, is necessary to make it so (w Though now the difference between a real park, and fucher closed grounds, is in many respects not very material: on that it is unlawful at common law for any person to kill a beafts of park or chase (x), except such as possess these fra chises of forest, chase, or park. Free-warren is a similar franchife, erected for preservation or custody (which t word fignifies) of beafts and fowls of warren (y); which, b ing ferae naturae, every one had a natural right to kill as could

⁽u) 2 Inst. 220. (v) 4 Inst. 314. (w) Co. Litt. 233 Inst. 199. 11 Rep. 86. (x) These are properly buck, doe, so martin, and roe; but in a common and legal sense extend likew to all the beasts of the forest: which, besides the other, are kneed to be hart, hind, hare, boar, and wolf, and in a word, all wild beasts of venary or hunting, (Co. Litt. 233). (y) The bare hares, conies, and roes: the sowle are either campestres, as tridges, rails, and quails; or sylvestres, as woodcocks and phe sants; or aquatiles, as mallards and herons. (Ibid).

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ould: but upon the introduction of the forest laws at the Vorman conquest, as will be shewn hereafter, these animals eing looked upon as royal game and the fole property of our avage monarchs, this franchife of free-warren was invented protect them; by giving the grantee a fole and exclusive ower of killing fuch game, fo far as their warren extended. condition of his preventing other persons. A man therere that has the franchise of warren, is in reality no more than royal game-keeper: but no man, not even a lord of a maor, could by common law justify sporting on another's soil, even on his own, unless he had the liberty of free-warn (z). This franchise is almost fallen into disregard, since e new statutes for preserving the game; the name being ow chiefly preserved in grounds that are set apart for breedg hares and rabbets. There are many instances of keen ortimen in antient times, who have fold their estates, and ferved the free warren, or right of killing game, to themlyes; by which means it comes to pass that a man and his is have sometimes free-warren over another's ground (a). free fishery, or exclusive right of fishing in a public river. also a royal franchise; and is considered as such in all counes where the feodal polity has prevailed (b): though the aking fuch grants, and by that means appropriating what ms to be unnatural to restrain, the use of running water, s prohibited for the future by king John's great charter, d the rivers that were fenced in his time were directed to be dopen, as well as the forests to be disafforested (c). This ening was extended, by the second (d) and third (e) chars of Henry III. to those also that were fenced under Riard I; so that a franchise of free fishery ought now to be least as old as the reign of Henry II. This differs from a veral fishery; because he that has a several fishery must also the owner of the foil, which in a free fishery is not requie, for tewi . It differs also from a common of piscary before mentioned,

²⁾ Salk. 637. (a) Bro. Abr. tit Warren. 3. (b) Seld. r. claus, i. 24. Dufreine. V. 503. Crag. de Jur. feod. II. 8. 15. c) Cap. 47. edit. Oxon. (d) Cap. 20. c, 16.

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oned, in that the free fishery is an exclusive right, the common of piscary is not so: and therefore, in a free fishery; a man has a property in the fish before they are caught; in a common of piscary not till afterwards (f). Some indeed have considered a free fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the feveral fishery of the grantor (g). But the considering such right as originally a flower of the prerogative, till restrained by magna carta, and derived by royal grant (previous to the reign of Richard I) to such as now claim it by prescription, may remove some difficulties in respect to this matter, with which our books are embarassed.

VIII. CORODIES are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance (h): In lieu of which (especially when due from eccles size street of the st

IX. Annuities, which are much of the same nature only that these arise from temporal, as the former from spin tual, persons. An annuity is a thing very distinct from rent charge, with which it is frequently confounded: a rent charge being a burthen imposed upon and issuing out of Land whereas an annuity is a yearly sum chargeable only upon the person of the grantor (j). Therefore, if a man by deed granton to another the sum of 201. per annum, without expressing of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity: which is of so littles count in the law, that, if granted to an eleemosynary coperation, it is not within the statutes of mortmain (k); and a man may have a real estate in it, though his security merely personal.

X. REN

⁽f) F. N. B. 88. Salk. 637. (g) 2 Sid. 8. (h) Finch. (g) 2 Sid. 8. (h) Finch. (g) Co. Litt. 144.

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X. RENT's are the last species of incorporeal hereditaments. The word, rent, or render, reditus, fignifies a compensation, or return; it being in the nature of an acknowlegement given for the possession of some corporeal inheritance (1). It is defined to be a certain profit iffued yearly out of lands and tenements corporeal. It must be a profit; yet there is no occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent (m). It may also consist in services or manual operations; as, to plough fo many acres of ground, to attend the king or the lord to the wars, and the like; which services in the eye of the law are profits. This profit must also be certain; or that which may be reduced to a certainty by either party. must also issue yearly; though there is no occasion for it to ishe every fuccessive year; but it may be reserved every second, third, or fourth year (n): yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold and enjoy them, it ought to be reerved yearly, because those profits do annually arise and are innually renewed. It must iffue out of the thing granted, and tot be part of the land or thing itself; wherein it differs from in exception in the grant, which is always of part of the hing granted (o). It must, lastly, issue out of lands and teements corporeal; that is, from some inheritance whereupon e owner or grantee of the rent may have recourse to distrein. herefore a grant cannot be referved out of an advowson, a ommon, an office, a franchise, or the like (p). But a grant f such annuity or sum may operate as a personal contract, nd oblige the grantor to pay the money reserved, or subject im to an action of debt (q); though it doth not affect the heritance, and is no legal rent in contemplation of law.

THERE are at common law (r) three manner of rents; at-service, rent-charge, and rent-seck. Rent-service is so Vol. II.

⁽l) Co. Litt. 144. (m) *Ibid.* 142. (n) *Ibid.* 47. (o) owd. 13. 8 Rep. 71. (p) Co. Litt. 144. (q) *Ibid* 47. (t) Litt. §, 243.

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called because it hath some corporal service incident to it, as at the least fealty, or the feodal oath of fidelity (s). For, if tenant holds his land by fealty, and ten shillings rent; or by the service of ploughing the lord's land, and five shilling rent; these pecuniary rents, being connected with personal fervices, are therefore called rent-fervice. And for these, in case they be behind, or arrere, at the day appointed, the lond may diffrein of common right, without referving any special power of diffres; provided he hath in himself the reversion, or future estate of the lands and tenements, after the leafe or particular estate of the lessee or grantee is expired (t). A rent. charge, is where the owner of the rent hath no future into rest, or reversion expectant in the land; as where a man by deed maketh over to others his whole estate in fee fimple, with a certain rent payable thereout, and adds to the deed a cove nant or clause of distress, that if the rent be arrere, or behind it shall be lawful to distrein for the same. In this case the land is liable to the diffress, not of common right, but by virtued the clause in the deed: and therefore it is called a rent-chang because in this manner the land is charged with a diffrest the payment of it (u). Rent-feek, reditus ficcus, or barre rent, is in effect nothing more than a rent referved by deal but without any clause of distress.

THERE are also other species of rents, which are reducht to these three. Rents of assignment the certain established rent of the freeholders and antient copyholders of a manor (which cannot be departed from or varied. Those of the stablished rent holders are frequently called chief rents, reditus capitales; a both sorts are indifferently denominated quieti reditus; be cause thereby the tenant goes quit and free of all other sent ces. When these payments were observed in silver or who money, they were antiently called subite-rents, or bland farms, reditus albi (x); in contradistinction to rents reserving work, grain, &c. which were called reditus nigri,

⁽s) Co. Litt. 142. (t) Litt. §. 2.15. (u) Co. Litt. (w) 2 Inft. 19. (x) In Scotland this kind of small payer is called blench holding, or redicus albae firmae.

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black maile (y). Rack-rent is only a rent of the full value of the tenement, or near it. A feefarm-rent is a rent-charge iffuing out of an estate in fee; of at least one fourth of the value of the land, at the time of its refervation (z): for a grant of lands, referving fo confiderable a rent, is indeed only letting lands to farm in fee simple, instead of the usual methods for life or years.

THESE are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by diffress for rents-feck, rents of affile, and chief-rents. as in case of rents reserved upon lease (a).

RENT is regularly due and payable upon the land from whence it iffues, if no particular place is mentioned in the refervation (b): but, in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country (c). And, strictly, the rent is demandable and payable before the time of funfet of the day whereon it is referved(d); though some have thought it not absolutely due till midnight (e).

WITH regard to the original of rents, fomething will be faid in the next chapter: and, as to diffresses and other remedies for their recovery, the doctrine relating thereto, and the feveral proceedings thereon, these belong properly to the third part of our commentaries, which will treat of civil injuries, and the means whereby they are redreffed.

(z) Co. Litt. 143. (y) 2 Inft. 19. (a) Stat. 4 Geo. II. c. 28. (b) Co. Litt. 201. (c) 4 Rep. 73. Anderf. 235. (e) 1 Saund, 287. 1 Chan. Prec, 559.

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CHAPTER THE FOURTH.

OF THE FEODAL SYSTEM.

T is impossible to understand, with any degree of accuracy, I either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feodal law: a fystem so universally received throughout Europe, upwards of twelve centuries ago, that fir Henry Spelman (a) does not scruple to call it the law of nations in our western This chapter will be therefore dedicated to this inquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occafion to fearch pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time mis-employed, when he is led to consider that the obfolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientifical manner, without having recourse to the attient. Nor will these researches be altogether void of rational entertainment as well as use: as in viewing the majestic ruis of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splender. THE

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THE constitution of feuds (b) had its original from the military policy of the northern or Celtic nations, the Goths, the Hunns, the Franks, the Vandals, and the Lombards, who all migrating from the same officina gentium, as Crag very justly entitles it (c), poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to fecure their new acquisitions: and, to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in fmaller parcels or allotments to the inferior officers and most deserving foldiers (d). These allotments were called feoda, feuds, fiefs, or fees; which last appellation in the northern languages (e) fignifies a conditional stipend or reward (f). Rewards or stipends they evidently were: and the condition annexed to them was, that the posfessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the juramentum fidelitatis, or oath of fealty (g): and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them (h).

ALLOTMENTS, thus required, naturally engaged such as accepted them to defend them: and, as they all sprang from C 3

(b) See Spelman of feuds, and Wright of tenures, per tot. (c) De jure feod. 19, 20. (d) Wright. 7. (e) Spelm. Gl. 216. (f) Pontoppidan in his history of Norway (page 290) observes hat in the northern languages ODH signifies propriet as and ALL dum. Hence he derives the ODHAL right in these countries; and hence too perhaps is derived the udal right in Finland, &c. See Mac Doual. Inst. part. 2.) Now the transposition of these normary syllables, ALLODH, will, give us the true etymology of the slodium, or absolute property of the seudists; as, by a similar commation of the latter syllable with the word FEE (which signifies, we have seen, a conditional reward or stipend) FEEODH or see aum will denote stipendiary property. (g) See this oath examined at large in Feud. 1, 2, 1, 7.

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the fame right of conquest, no part could subfit independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each others possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was neceffary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewife subordinate to and under the command of his immediate benefactor or fune. rior; and fo upwards to the prince or general himfelf. And the feveral lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given Thus the feodal connection was established, a proper military fubjection was naturally introduced, and an army of feudatories were always ready enlifted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole, and of every part of this their newly acquired country (i): the prudence of which constitution was foon sufficiently visible in the strength and fpirit, with which they maintained their conquests.

THE universality and early use of this feodal plan, among all those nations which in complaifance to the Romans we fill call barbarous, may appear from what is recorded (k) of the Cimbri and Teutones, nations of the fame northern original as those whom we have been describing, at their first imp tion into Italy about a century before the christian æra. They demanded of the Romans, " ut martius populus aliquia shi " terrae daret, quasi stipendium: caeterum, ut vellet, mani-" bus atque armis fuis uteretur." The sense of which may be thus rendered; they defired flipendiary lands (that is feuds) to be allowed them, to be held by military and other personal fervices, whenever their lord should call upon them This was evidently the same constitution, that displayed it felf more fully about feven hundred years afterwards; when the Salii, Burgundians, and Franks broke in upon Gaul, the Vifigoths

⁽i) Wright. 8. (k) L. Florus. l. 3. c. 3.

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Visigoths on Spain, and the Lombards upon Italy; and inroduced with themselves this northern plan of policy, serving
it once to distribute, and to protect, the territories they had
newly gained. And from hence it is probable that the empeor Alexander Severus (1) took the hint, of dividing lands
onquered from the enemy among his generals and victorious
oldiery, on condition of receiving military service from them
and their heirs for ever.

SCARCE had these northern conquerors established themelves in their new dominions, when the wisdom of their onstitutions, as well as their personal valour, alarmed all he princes of Europe; that is, of those countries which had ormerly been Roman provinces, but had revolted, or were eserted by their old masters, in the general wreck of the emre. Wherefore most, if not all, of them thought it necesry to enter into the same or a similar plan of policy. hereas, before, the possessions of their subjects were perfily allodial, (that is, wholly independent, and held of no perior at all, now they parcelled out their royal territories, or rsuaded their subjects to surrender up and retake their own nded property, under the like feodal obligations of military alty (m). And thus, in the compass of a very few years e feodal constitution, or the doctrine of tenure, extended felf over all the western world. Which alteration of landed operty, in so very material a point, necessarily drew after it alteration of laws and customs: so that the feodal laws on drove out the Roman, which had hitherto univerfally tained, but now became for many centuries loft and fortten; and Italy itself (as some of the civilians, with more een than judgment, have expressed it) belluinas, atque fenas, immanesque Longobardorum leges accepit (n).

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P. 52

But this feodal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman (o). Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what sir William Temple calls the same northern hive, something similar to this was in use: yet not so extensively, nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that seuds arrived to their full vigour and maturity, even on the continent of Europe (p).

THIS introduction however of the feodal tenures into England, by king William, does not feem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the conqueror; but to have been gradually established by the Norman barons, and others, in fuch forfeited lands as they received from the gift of the conqueror, and afterwards univerfally consented to by the great council of the nation long after his title was established. Indeed from the prodigious flaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who furvived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monking historians, and such as have implicitly followed them, to represent him as having by right of the sword seised on all the lands of England, and dealt them out again to his own favourites. A supposition grounded upon a mistaken sense d the word conquest; which in its feodal acceptation, fignifis no more than acquisition: and this has led many hasty writer into a strange historical mistake, and one which upon the flightest examination will be found to be most untrue. However

⁽o) Spelm. Gloff. 218. Bract. 1. 2. c. 16. §. 17. (p) Crag. 1

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ever, certain it is, that the Normans now began to gain very large possessions in England: and their regard for the feodal law, under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle (q), that in the nineteenth year of king William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its flead, the kingdom was wholly defenceles: which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, night co-operate with the king's remonstrances, and the beter incline the nobility to listen to his proposals for putting hem in a posture of defence. For, as soon as the danger was ver, the king held a great council to inquire into the state of he nation (r); the immediate consequence of which was the ompiling of the great furvey called domes-day-book, which vas finished in the next year: and in the latter end of that: ery year the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the oke of military tenure, became the king's vafals, and did hopage and fealty to his person (s). This may possibly have een the æra of formally introducing the feodal tenures by w; and perhaps the very law, thus made at the council of arum, is that which is still extant (t), and couched in these remark-

⁽⁹⁾ A.D. 1085. (1) Rex tenuit magnum concilium, et grassermones habuit cum suis proceribus de hac terra, quo modo inleretur, et a quibus hominibus. Chron. Sax. ibid. (5) On-t praedia tenentes, quotquot essent notae melioris per totam Anlam, ejus homines facti sunt, et omnes se illi subdidere, ejusque di sunt vasalli, ac ei sidelitatis juramenta praestiterunt, se contratos quoscunque illi sidos suturos. Chron. Sax. A.D. 1086. (1) p. 52. Wilk. 228:

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" flatuimus, ut omnes liberi bomiremarkable words: " nes feodere et sacramento affirment, quod intra et extra uni. " versum regnum Angliae Wilhelmo regi domino suo fideles " esse volunt; terras et honores illius omni fidelitate ubique " servare cum eo, et contra inimicos et alieni genas defendere." The terms of this law (as fir Martin Wright has observed) (u) are plainly feodal: for, first, it requires the oath of fealty, which made in the fense of the feudists every man that took it a tenant or vafal; and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the fame collection (v), which exacts the performance of the military feodal fervices, as ordained by the general council. " Omnes comites, et barones, et milites, et servientes, et uni-" versi liberi homines totius regni nostri praedicti, babeant " et teneant se semper bene in armis et in equis, ut decet et " oportet, et fint semper prompti et bene parati, ad servitium " fum integrum nobis explandum et peragendum, cum opus " suerit; secundum quod nobis debent de foedis et tenementis suis " de jure facere, et ficut illis flatuimus per commune concilium " totius regni nostri praedicti."

This new polity therefore feems not to have been imposed by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all its allocial or free lands into the king's hands, who restored them to the owners as a benficium or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees all the allocial estates of France were converted into seuds, and the freemen became the vasals of the crown (w). The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually,

⁽u) Tenures. 66. (v) cap. 58. Wilk. 228. (w) Montefq. Sp. L. b. 31. c. 8.

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ally, by the consent of private persons; the latter was done at once all over England, by the common consent of the nation (x).

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, " that the king is the universal "lord and original proprietor of all the lands in his king-" dom (v); and that no man doth or can possess any part of "it, but what has mediately or immediately been derived as a " oift from him, to be held upon feodal fervices." For, this being the real case in pure, original proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise. And indeed by thus confenting to the introduction of feodal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military fystem; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigour and fealty, as if they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But, whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feodal constitutions. and well understanding the import and extent of the feodal terms, gave a very different construction to this proceeding; and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and fervices, as were never known to other nations (z); as if the English had in fact, as well as theory, owed every thing they had to the bounty of their fovereign lord.

Our ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the

⁽x) Pharoah thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, referving an annual render of the fifth part of their value. (Gen. xlvii.) (y) Tout fuit in lay, et wient de lay al commencement. (M. 24. Edw. III. 65.) (2) Spelm. of feuds, c. 28.

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the crown, as the bass of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth (a). However, this king, and his fon William Rufus, kept up with a high hand all the rigours of the feodal doctrines: but their fuccessor, Henry I. found it expedient, when he fet up his pretensions to the crown, to promise a restitution of the laws of king Edward the confessor, or antient Saxon system; and accordingly, in the first year of his reign, granted a charter (b), whereby he gave up the greater grievances, but still referved the fiction of feodal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself, and succeeding princes; till in the reign of king John they became so intolerable, that they occasioned his barons, or principal feudatories, to rife up in arms against him: which at length produced the famous great charter at Runing-mead, which, with some alterations, was confirmed by his fon Henry III. And, though its immunities (especially as altered on its last edition by his son) (c) are very greatly short of those granted by Henry I. it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has fince happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted: but this, properly considered, will shew; not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that antient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

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⁽a) Wright. 81. (b) LL. Hen. I. c. 1. (c) 9 Een. Ill.

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HAVING given this short history of their rise and progress, we will next consider the nature, doctrine, and principal laws of seuds; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the original of such of our own tenures, as were either abolished in the last century, or still remain in force.

THE grand and fundamental maxim of all feodal tenure is this; that all lands were originally granted out by the fovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or lord; being he who retained the dominion of ulimate property of the feud or fee: and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory or vasal, which was only another name for the tenant or holder of the lands; though, on acount of the prejudices we have justly conceived against the oftrines that were afterwards grafted on this system, we now ife the word vafal opprobriously, as fynonimous to flave or ondman. The manner of the grant was by words of grauitous and pure donation, dedi et concessi; which are still he operative words in our modern infeodations or deeds of coffment. This was perfected by the ceremony of corporal westiture, or open and notorious delivery of possession in the resence of the other vasals, which perpetuated among them he æra of the new acquisition, at a time when the art of riting was very little known: and therefore the evidence of roperty was reposed in the memory of the neighbourhood; tho, in case of a disputed title, were afterwards called upon to ecide the difference, not only according to external proofs, dduced by the parties litigant, but also by the internal testiony of their own private knowlege.

Besides an oath of fealty, or profession of faith to the ord, which was the parent of our oath of allegiance, the valor tenant upon investiture did usually homage to his lord; openly

openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sate before him; and there professing that "he did be" come his man, from that day forth, of life and limb and earthly honour:" and then he received a kiss from his lord (d). Which ceremony was denominated homagium, or manhood, by the fuedists, from the stated form of words, devenio vester homo (e).

WHEN the tenant had thus professed himself to be the man of his fuperior or lord, the next confideration was concerning the fervice, which, as fuch, he was bound to render, in recompense for the land he held. This, in pure, proper, and original feuds, was only twofold: to follow, or do fuit to the lord in his courts in the time of peace: and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge overall his feudatories: and therefore the vasals of the inferior lords were bound by their fealty to attend their domestic courts baron (f), (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants) in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants; and upon this account, in all the feodal inftitutions both here and on the continent, they are distinguished by the appellation of the peers of the court; pares curtis, or pares curiae. In like manner the barons themselves, or lords of inferior diffricts, were denominated peers of the king's court, and were bound to attend him upon fummons, to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary; till in many countries the power of that office was broken and distributed into other courts of judicature, the peers of the king's court full referving

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⁽d) Litt. §. 85. (e) It was an observation of Dr. Arbuthood that tradition was no where preserved so pure and incorrupt a among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope vi. 134. 8vo.) Perhaps it may be thought puerile to observe (in confirmation of this remark) that in one of our antient passimes (the king I am or basilinda of Julius Pollux, Onomastic. 1. 9. c. 7.) the cremonies and language of feodal homage are preserved with great exactness. (f) Feud. 1. 2. t. 55.

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the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

AT the first introduction of feuds, as they were gratuitous. balfo they were precarious and held at the will of the lord (g), who was then the fole judge whether his vafal performed his ervices faithfully. Then they became certain, for one or nore years. Among the antient Germans they continued nly from year to year; an annual distribution of lands being nade by their leaders in their general councils or affemlies (h). This was professedly done, lest their thoughts should e diverted from war to agriculture; lest the strong should acroach upon the possessions of the weak; and lest luxury nd avarice should be encouraged by the erection of permaent houses, and too curious an attention to convenience and ne elegant superfluities of life. But, when the general miration was pretty well over, and a peaceable possession of eir new-acquired fettlements had introduced new customs nd manners; when the fertility of the foil had encouraged he study of husbandry, and an affection for the spots they ad cultivated began naturally to arife in the tillers; a more ermanent degree of property was introduced, and feuds bean now to be granted for the life of the feudatory (i). But Ill fends were not yet bereditary; though frequently granted, the favour of the lord, to the children of the former offesfor; till in process of time it became unusual, and was erefore thought hard, to reject the heir, if he were capable perform the fervices (k): and therefore infants, women, d professed monks, who were incapable of bearing arms,

⁽p) Feed. l. 1. t. 1. (h) Thus Tacitus: (de mor. Germ. 26) " age i ab universis per vices occupantur: arva per annos mutant." And Cæsar yet more sully: (de bell. Gall. l. 6. c. 21.) Neque quisquam agri modum certum, aut sines proprios habet; sed mogistratus et principes in anos singulos, gentibus et cognationibus hominum qui una coierunt, quantum eis et quo loco vi sum est, attribunt agri, atque anno post alio transare cogunt." (i) nd. l. 1. t. 1. (k) Wright. 14.

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were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowlegement to the lord in horses, arms, money, and the like, for such renewal of the feud: which was called a relief, because it re-established the inheritance, or, in the words of the feodal writers, "increase et caducam hereditatem relevabat." This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

FOR in process of time feuds came by degrees to be univerfally extended, beyond the life of the first vasal, to his form, or perhaps to fuch one of them, as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his fons, all his fons fucceeded him in equal portions; as they died off, their fhares reverted to the lord, and did not descend to their children, or even to their furviving brothers, as not being specified in the donation (1). But when fuch a feud was given to a man, and his beirs, in general terms, then a more extended rule of succession took place; and when a feudatory died, his male descendants in infinitum were admitted to the succesfion. When any fuch descendant, who thus had succeeded, died, his male descendants were also admitted in the furt place; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feodal fuccession, that " none was capable of inheriting a feud, but " fuch as was of the blood of, that is, lineally descended " from, the first feudatory (m). And the descent, being thus confined to males, originally extended to all the males alike; all the fons, without any distinction of primogeniture, fucceeding to equal portions of the father's feud. But this being found upon many accounts inconvenient, (particularly, by dividing the fervices, and thereby weakening the strength of the feodal union) and bonorary feuds (or titles of nobility)

(1) Wright. 17. (m) Ibid. 183.

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being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son (n); in imitation of these, military sends (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest (0).

OTHER qualities of feuds were, that the feudatory could not liene or dispose of his feud; neither could he exchange, nor et mortgage, nor even devise it by will, without the consentof he lord (p). For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit e should be at liberty to transfer this gift, either from himself, or from his posterity who were presumed to inherit his valour, o others who might prove less able. And, as the feodal obigation was looked upon as reciprocal, the feudatory being enitled to the lord's protection, in return for his own fealty and ervice; therefore the lord could no more transfer his seignory r protection without consent of his vasal, than the vasal could is feud without consent of his lord (q): it being equally uneasonable, that the lord should extend his protection to a erson to whom he had exceptions, and that the vasal should we subjection to a superior not of his own choosing.

These were the principal, and very simple, qualities of the enuine or original feuds; being then all of a military nature, and in the hands of military persons: though the feudatories eing under frequent incapacities of cultivating and manuring neirown lands, soon found it necessary to commit part of them o inferior tenants; obliging them to such returns in service, orn, cattle, or money, as might enable the chief feudatories of attend their military duties without distraction: which returns, or reditus, were the original of rents. And by this means the feodal polity was greatly extended; these inferior audatories (who held what are called in the Scots law "reresses") being under similar obligations of fealty, to do suit of court,

⁽n) Feud. 2. t. 55. (a) Wright. 32. (p) Ibid. 29. (4)

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court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords (r). But this at the same time demolished the antient simplicity of feuds; and an inroad being once made upon their constitution. it subjected them, in a course of time, to great varieties and Feuds came to be bought and fold, and deviainnovations. tions were made from the old fundamental rules of tenure and fuccession; which were held no longer facred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into feoda propria et impropria, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprized all fuch as do not fall within the other defcription: fuch, for instance, as were originally bartered and sold to the feudatory for a price; fuch as were held upon base or less honourable fervices, or upon a rent, in lieu of military fervice; fuch as were in themselves alienable, without mutual license; and fuch as might descend indifferently either to males or fe-But, where a difference was not expressed in the creation, fuch new-created feuds did in all other respects follow the nature of an original, genuine, and proper feud (s).

But as soon as the feodal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the lander property of England, will appear in the following chapters.

⁽r) Wright 20.

⁽s) Feud. 2. t. 7.

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CHAPTER THE FIFTH.

THE ANTIENT ENGLISH TENURES.

N this chapter we shall take a short view of the antient tenures of our English estates, or the manner in which ads, tenements, and hereditaments might have been holden; the same stood in force, till the middle of the last century. I which we shall easily perceive, that all the particularities, the seeming and real hardships, that attended those tenures, ere to be accounted for upon feodal principles and no other; ting fruits of, and deduced from, the feodal policy.

ALMOST all the real property of this kingdom is by the pory of our laws supposed to be granted by, dependant upon, dholden of some superior or lord, by and in consideration of main services to be rendered to the lord by the tenant or posfor of this property. The thing holden is therefore styled a nement, the possessions thereof tenants, and the manner of their steffion a tenure. Thus all the land in the kingdom is supled to be holden, mediately or immediately, of the king; no is styled the lord paramount, or above all. Such tenants held under the king immediately, when they granted out rtions of their lands to inferior persons, became also lords th respect to those inserior persons, as they were still tenants th respect to the king; and, thus partaking of a middle nate, were called mefne, or middle, lords. So that if the king anted a manor to A, and he granted a portion of the land to now B was faid to hold of A, and A of the king; or, in other

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words, B held his lands immediately of A, but mediately of the king. The king therefore was styled lord paramount, A was both tenant and lord, or was a mesne lord; and B was called tenant parawail, or the lowest tenant; being he whosup posed to make avail, or profit, of the land (a). In this manner are all the lands of the kingdom holden, which are in the hand of subjects: for, according to sir Edward Coke (b), in the law of England we have not properly allodium; which, we have seen (c), is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly seuds, or partake very strongly of the feodinature.

ALL tenures being thus derived, or supposed to be derived from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants in capite, or in chief; which was the most honourable species of tenur but at the same time subjected the tenants to greater and more burthensome services, than inferior tenures did (d). The distinction ran through all the different sorts of tenure; of which I now proceed to give an account.

I. THERE seem to have subsisted among our ancestors for principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of these veral services or renders, that were due to the lords from the tenants. The services, in respect of their quality, were either free or base services; in respect of their quantity and the time of exacting them, were either certain or uncertain. Free services were such as were not unbecoming the character of soldier, or a freeman, to perform; as to serve under his lording

⁽a) 2 Inst. 296. (b) 1 Inst. 1. (c) pag. 47. (d) the Germanic constitution, the electors, the bishops, the secular princes, the imperial cities, &c. which hold directly from them peror, are called the *immediate* states of the empire; all other holders being denominated mediate ones. Mod. Un. Hist. xlii. 6

en |200 ewars, to pay a fum of money, and the like. Base services ere such as were sit only for peasants, or persons of a servile nk; as to plough the lord's land, to make his hedges, to ryout his dung, or other mean employments. The certain vices, whether free or base, were such as were stinted in antity, and could not be exceeded on any pretence; as, to y a stated annual rent, or to plough such a field for three ys. The uncertain depended upon unknown contingencies: to do military service in person, or pay an assessment in lieu it, when called upon; or to wind a horn whenever the Scots vaded the realm; which are free services: or to do whatever clord should command; which is a base or villein service.

FROM the various combinations of these services have arisen four kinds of lay tenure which sublisted in England, till the ddle of the last century : and three of which subfift to this v. Of these Bracton (who wrote under Henry the third) ms to give the clearest and most compendious account of y author antient or modern (e); of which the following is outline or abstract (f). "Tenements are of two kinds. frank-tenement, and villenage. And, of frank-tenements, ome are held freely in confideration of homage and knightfervice; others in free-focage with the fervice of fealty only." nd again (g), " of villenages some are pure, and others privileged. He that holds in pure villenage shall do whatsoever s commanded him, and always be bound to an uncertain Service. The other kind of villenage is called villein-socage; and these villein-sockmen do villein services, but such as are certain and determined." Of which the sense seems to be follows: first, where the service was free, but uncertain, military service with homage, that tenure was called the tenure

e) l. 4. tr. 1. c. 28. (f.) Tenementorum aliud liberum, aliud enagium. Item, liberorum aliud tenetur libere pro homagio et serio militari; aliud in libero socagio cum fidelitate tantum. §. 1. 8) Villenagiorum aliud puram, aliud privilegiatum. Qui tenet buro villenagie faciet quicquid ei præceptum suerit, et semper tetur ad incerta. Aliud genus villenagii dicitur villannm socam; et hujusmodi villani socmanni—villana faciunt servitia, sed ta et determinata. §. 5.

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Secondly, where the service was not only free, but also certain as by fealty only, by rent and fealty, &c. that tenure was call liberum socialism, or free sociage. These were the only so holdings or tenements; the others were villenous or service as, thirdly, where the service was base in its nature, and a certain as to time and quantity, the tenure was purum villar gium, absolute or pure villenage. Lastly, where the service was base in its nature, but reduced to a certainty, this was willenage, but distinguished from the other by the name oprivileged villenage, villenagium privilegiatum; or it might be still called sociage (from the certainty of its services) he degraded by their baseness into the inferior title of villenagia socialism, villein-sociage.

I. THE first, most universal, and esteemed the most honor able species of tenure, was that by knight-service, called Latin fervitium militare, and in law-French chivalry, or h vice de chivaler answering to the fief d' haubert of the No mans (h), which name is expressly given it by the mirrour This differed in very few points, as we shall presently from a pure and proper feud, being entirely military, and genuine effect of the feodal establishment in England. I make a tenure by knight-service, a determinate quantity land was necessary, which was called a knight's fee, feed militare; the value of which, not only in the reign of Edward II (k), but also of Henry II (l), and therefore probably at original in the reign of the conqueror, was stated at 201 annum; and a certain number of these knights fees were quifite to make up a barony. And he who held this propo tion of land (or a whole fee) by knight-fervice, was bound attend his lord to the wars for forty days in every year, if call upon: which attendance was his reditus or return, his rent fervice, for the land he claimed to hold. If he held only had knight's fee, he was only bound to attend twenty days, and in proportion (m). And there is reason to apprehend, that ferva

⁽h) Spelm. Gloff.219. 1. Edw. II Co. Litt. 69. § 95.

⁽i) c. 2. §. 27. (k) Stat. de sil. (l) Glanvill. l. 9. c. 4. (m) Lit

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ervice was the whole that our ancestors meant to subject hemselves to; the other fruits and consequences of this teure being fraudulently superinduced, as the regular (though mforeseen) appendages of the feodal system.

This tenure of knight-service had all the marks of a strict and regular seud: it was granted by words of pure donation, edi et concessi (n); was transferred by investiture or delivering or or poral possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew afterit hese seven fruits and consequences, as inseparably incident to be tenure in chivalry; viz. aids, relief, primer seisin, wardin, marriage, sines for alienation, and escheat: all which I hall endeavour to explain, and shew to be of seodal original.

1. AIDS were originally mere benevolences granted by the mant to his lord, in times of difficulty and diffress (0); but in pocess of time they grew to be considered as a matter of right, nd not of discretion. These aids were principally three: rft, to ranfom the lord's person, if taken prisoner; a necessary onsequence of the feodal attachment and fidelity; insomuch hat the neglect of doing it, whenever it was in the vafal's ower, was, by the strict rigour of the feodal law, an absolute orfeiture of his estate (p). Secondly, to make the lord's eldest on a knight; a matter that was formerly attended with great eremony, pomp, and expense. This aid could not be denanded till the heir was fifteen years old, or capable of bearing rms (q): the intention of it being to breed up the eldest fon, nd heir apparent of the seignory, to deeds of arms and chialry, for the better defence of the nation. Thirdly, to marry, he lord's eldest daughter, by giving her a suitable portion: or daughters' portions were in those days extremely slender; ew lords being able to fave much out of their income for this

⁽n) Co. Litt. 9. (o) Auxilia funt de gratia et non de jure,—
um defendeant ex gratia tenentium et nou ad voluntatem dominoum. Bracton. l. 2. tr. 1. c. 16. § 8. (p) Feud. l. 2. t. 24.
(q) 2 I. ft. 233.

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purpose; nor could they acquire money by other means, be ing wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this, or any other incumbrances. From bearing their proportion to the aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom the lands were holden) and the marriage of his female descent ants (r). And one cannot but observe, in this particular, the great resemblance which the lord and vasal of the feodal lar bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagements defence and protection. With regard to the matter of aids there were three which were usually raised by the client; via to marry the patron's daughter; to pay his debts; and ton deem his person from captivity (s).

But besides these antient feodal aids, the tyranny of look by degrees exacted more and more; as, aids to pay the look debts, (probably in imitation of the Romans) and aids to enable him to pay aids or reliefs to his superior lord; from which a indeed the king's tenants in capite were, from the nature of their tenure, excused, as they held immediately of the king who had no superior. To prevent this abuse, king John's magnacard (t) ordained, that no aids be taken by the king without consents parliament, nor in any wise by inferior lords, save only the threatient ones above mentioned. But this provision was omitted Henry III's charter, and the same oppressions were continued the 25 Edw. I. when the statute called consirmatio chartarumwa enacted; which in this respect revived king John's charter, by ordaining that none but the antient aids should be taken. But though the species of aids was thus restrained, yet the quantity

⁽r) Philips's life of Pole. I. 223. (s) Erat autem bec interest utrosque officiorum vicissitudo,—ut clientes ad collocandas senatorus filias de suo conferrent; in aeris alieni dissolutionem gratuitam pe cuniam erogarent; et ab hostibus in bello captos redimerent. Pet Manutius, de senatu Romano, c. 1. (1) cap. 12. 15.

of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords hould be reasonable (u); and that the aids taken by the king of his tenants in capite should be settled by parliament (w). But they were never completely ascertained and adjusted till he statute Westm. 1. 3 Edw. I. c. 36. which fixed the aids of serior lords at twenty shillings, or the supposed twentieth art of every knight's fee, for making the eldest son a knight, a marrying the eldest daughter; and the same was done with egard to the king's tenants in capite by statute 25 Edw. III.

11. The other aid, for ransom of the lord's person, being of in its nature capable of any certainty, was therefore never scertained.

2. RELIEF, relevium, was before mentioned as incident every feodal tenure, by way of fine or composition with e lord for taking up the estate, which was lapsed or fallen by the death of the last tenant. But, though reliefs had heir original while feuds were only life-estates, yet they connued after feuds became hereditary; and were therefore oked upon, very justly, as one of the greatest grievances of nure: especially when, at the first, they were merely artrary and at the will of the lord; so that, if he pleased to emand an exorbitant relief, it was in effect to difinherit the eir (x). The English ill brooked this consequence of their ew adopted policy; and therefore William the conqueror by slaws (y) afcertained the relief, by directing (in imitation of e Danish heriots) that a certain quantity of arms and habilients of war should be paid by the earls, barons, and vavaurs respectively; and, if the latter had no arms, they should ly 100 s. William Rufus broke through this composition, id again demanded arbitrary uncertain reliefs, as due by the odal laws; thereby in effect obliging every heir to newschase or redeem his land (z): but his brother Henry I. by e charter before-mentioned restored his father's law; and Vol. II.

⁽u) cap. 15. (w) Ibid. 14 (x) Wright. 99. (y) c. 123, 24. (z) 2 Roll. Abr. 514.

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ordained, that the relief to be paid should be according to the law so established, and not an arbitrary redemption (a). But afterwards, when, by an ordinance in 27 Hen. II. called the affife of arms, it was provided that every man's armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowlegements in arms, according to the laws of the conqueror, the composition was univerfally accepted of 100 s. for every knight's fee; as we find it ever after established (b). But it must be remembered that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years.

3. PRIMER feisin was a feodal burthen, only incident to the king's tenants in capite, and not to those who held of inferiorer mesne lords. It was a right which the king had, when any of his tenants in capite died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands if they were in immediate possession; and half a years profits, if the lands were in reversion expectant on an estate for life (c). This seems to be little more than as additional relief: but grounded upon this feodal reason; that, by the antient law of feuds, immediately upon a death of a vafal the fuperior was entitled to enter and take feifin or polfession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture: and, for the time the lord fo held it, he was entitled to take the profits; and, unless the heir claimed within a year and a day, it was by the strict law a forfeiture (d). This practice however feems not to have long obtained in England, if ever, with regard to tenures under inferior lords; but, as to the king tenures in capite, this prima seisina was expressly declared, under Henry III. and Edward II. to belong to the king by prerogative, in contradistinction to other lords (e). And theking was entitled to enter and receive the whole profits of the land

Marlbr. c. 16. 17 Edw. II. c. 3.

⁽a) "Haeres non redimet terram suam, ficut faciebat temps"

fratris mei. sed legitima et justa relevatione relevabit est. (Text. Roffens. cap. 34.)
(b) Glanv. l. 9. c. 4. Litt. § 11.
(c) Co. Litt. 77.
(d) Feud. l. 2. t. 24.
(e) Stal

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till livery was fued; which fuit being commonly within a year and a day next after the death of the tenant, therefore the king used to take at an average the first fruits, that is to say, one year's profits of the land(f). And this afterwards gave a handle to the popes, who claimed to be feodal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of primitiae, or first fruits.

4. THESE payments were only due if the heir was of full age; but if he was under the age of twenty one, being a male, or fourteen, being a female (g), the lord was entitled to the wardship of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of fuch heir, without any account of the profits, till the age of twenty one in males, and fixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the fervice. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty one, or the heir-female of fourteen: yet, if the was then under fourteen, and the lord once had her in ward, he might keep her fo till fixteen, by virtue of the statute of Westm. 1. 3 Edw. I. c. 22. the two additional years being given by the legislature for no other reason but merely to benefit the lord (h).

This wardship, so far as it related to land, though it was not, nor could be part of the law of seuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor simulate for the services of the seud, does not seem upon seodal principles to have been unreasonable. For the wardship of the land, or custody of the seud, was retained by the lord, that he might out of the profits thereof provide a fit person to D 2

⁽f) Steundf. Prorog. 12.

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fupply the infant's services, till he should be of age to perform them himself. And, if we consider a seud in its original import, as a stipend, see, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such stipendiary donation was a mere supposition or sigment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I. before-mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

THE wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also, in a political view, the lord was most concerned to give his tenant a suitable education, in order to qualify him the better to person those services which in his maturity he was bound to render.

When the male heir arrived at the age of twenty one, or the heir-female to that of fixteen, they might fue out their livery or ouflerlemain (i); that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land: though this feems expressly contrary to magna carta (k). However, in confideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins (1). In order to ascertain the profits that aroke to the crown by these fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county (m), commonly called an inquisitio por mortem; which was instituted to enquire (at the death of any man of fortune) the value of his estate, the tenure by which

⁽i) Co. Litt. 77. (k) 9 Hen. III c. 3. (1) Co. Litt. 77. (m) Hoveden. fub. Ris. I.

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it was holden, and who, and of what age, his heir was: thereby to ascertain the relief and value of the primer seifin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII. that by colour of salse inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto (n). And afterwards, a court of wards and liveries was erected (o), for conducting the same enquiries in a more solemn and legal manner.

WHEN the heir thus came of full age, provided he held a knight's fee, he was to receive the order of knighthood, and was compellable to take it upon him, or elfe pay a fine to the king. For, in those heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and folemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who in order to qualify their young men to bear arms, presented them in a full affembly with a shield and lance; which ceremony, as was formerly hinted (p), is supposed to have been the original of the feodal knighthood (q). This prerogative, of compelling the vafals to be knighted, or to pay a fine, was expressly recognized in parliament, by the statute de militibus, I Edw. II. was exerted as an expedient of raising money by many of our best princes, particularly by Edward VI. and queen Elizabeth; but yet was the occasion of heavy murmurs when exerted by Charles I. among whose many misfortunes it was, hat neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion, of prerogative,

(n) 4 Inst. 198. (o) Stat. 32 Hen VIII c. 46. (p) Vol. 1918. 392. (q) "In ipfo concilio vel principum aliquis, vel pater, vel propinquus scuto frameaque juvenum ornant. Haec apud illus toga, bic primus juventae honos: ante hoc domus pars videntur; mex reipublicae." De mor. Germ. cap. 13.

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rogative. However, among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of his crown, and it was accordingly abolished by statute 16 Car. I. c. 20.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of marriage (maritagium, as contradistinguished from matrimonium) which in its feodal fense fignifies the power, which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a fuitable match, without difparagement, or inequality: which if the infants refused, they forfeited the value of the marriage, valorem maritagii, to their guardian (r); that is, so much as a jury would affess, or any one would bona fide give to the guardian for fuch an alliance (s): and, if the infants married themselves without the guardian's confent, they forfeited double the value, duplicem valorem maritagii (t). This feems to have been one of the greatest hardships of our antient tenures. There are indeed fubstantial reasons why the lord should have the restraint and controll of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy (u). But no tolerable pretence could be affigned why the lord should have the fale, or value, of the marriage. Nor indeed is this claim of strictly feodal original; the most probable account of it feeming to be this: that by the custom of Normandy the lord's confent was necessary to the marriage of his female ward (w); which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since in the often-cited charter of Henry the first, he engaged for the future to take nothing for his confent; which also he promise

⁽r) Litt. § 110. (s) Stat. Mert c. 6. Co. Lit. 82. (t) Litt. §. 110. (u) Bract. l. 2. c. 37. §. 6. (w) Gr. Cust. 55

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in general to give, provided fuch female ward were not married to his enemy. But this, among other beneficial parts of that charter, being difregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by King John's great charter, that heirs hould be married without disparagement, the next of kin having previous notice of the contract (x); or, as it was expressed in the first draught of that charter, ita maritentur ne difaragentur, et per confilium propinquorum de confanguinitate sua (y). But these provisions in behalf of the relations were omitted in the charter of Henry III. wherein (z) the clause stands merely thus, " haeredes maritentur absque dif-" paragatione;" meaning certainly, by baeredes, heirs-female, as there are no traces before this to be found of the lord's claiming the marriage of heirs male; and as Glanvil (a) expressly confines it to heirs female. But the king and his great lords thenceforward took a handle from the ambiguity of this expression to claim them both, sive sit masculus sive foemina, as Bracton more than once expresses it (b); and also, as nothing but disparagement was restrained by magna carta, they thought themselves at liberty to make all other advantages that they could (c). And afterwards this right, of felling the ward in marriage or else receiving the price or value of it, was expressly declared by the statute of Merton (d); which s the first direct mention of it that I have met with, in our own or in any other law.

6. ANOTHER attendant or consequence of tenure by knightervice was that of fines due to the lord for every alienation,
whenever the tenant had occasion to make over his land to
mother. This depended on the nature of the feodal conlexion; it not being reasonable nor allowed, as we have beore seen, that a seudatory should transfer his lord's gift to
mother, and substitute a new tenant to do the service in his
win stead, without the consent of the lord: and, as the seoD 4

(c) Weight. 97. (d) 20 Hen. III. c. 6.

⁽x) cap. 6. edit. Oxon. (y) cap. 3. ibid. (z) cap. 6.
(a) 1. 9. c. 9. & 12. & 1. 9. c. 4. (b) 1. 2. c. 38. §. 1.

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dal obligation was confidered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which confent of his was called an attornment. This reftraint upon the lords foon wore away; that upon the tenants confinued longer. For, when every thing came in process of time to be bought and fold, the lords would not grant ali. cence to their tenants to aliene, without a fine being paid: apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal eftate, it was much more reasonable that a stranger should make the same acknowlegement on his admission to a newly purchased fend, With us in England, these fines seem only to have been exacted from the king's tenants in capite, who were never able to aliene without a licence: but, as to common persons, they were at liberty, by magna carta (e), and the statute of quia emptores (f), (if not earlier) to aliene the whole of their estate to be holden of the same lord, as they themselves held it of before. But the king's tenants in capite, not being included under the general words of these statutes, could not alient without a licence: for if they did, it was in antient strictness an absolute forfeiture of the land (g); though some have imagined otherwise. But this severity was mitigated by the statute 1 Edw. III. c. 12. which ordained, that in such case the lands fliould not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one third of the yearly value should be paid for a licence of alienation; but, if the tenant prefumed to aliene without a licence, a full year's value should be paid (h).

7. THE last consequence of tenure in chivalry was escheat; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means; if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out and about the state of the

⁽e) cap. 32. (h) Ibid. 67.

⁽f) 18 Edw. I. c. I.

⁽g) 2 Inft. 66.

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lished. In such cases the land escheated, or fell back, to the lord of the fee (i); that is, the tenure was determined by breach of the original condition, expressed or implied in the second donation. In the one case, there were no heirs sub-sisting of the blood of the first feudatoty or purchaser, to which heirs alone the grant of the feud extended: in the other, the tenant, by perpetrating an atrocious crime, shewed that he was no longer to be trusted as a vasal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it (k).

THESE were the principal qualities, fruits, and confequences of the tenure by knight-service: a tenure, by which the greatest part of the lands in this kingdom were holden, and that principally of the king in capite, till the middle of the last century; and which was created, as fir Edward Coke expressly testifies (1), for a military purpose; viz. for defence of the realm by the king's own principal fubjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-fervice proper, and because they were attended with fimilar fruits and confequences. Such was the tenure by grand serjeanty, per magnum servitium, whereby the tenant was bound, instead of serving the king generally in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronaion (m). It was in most other respects like knight-service (n); only D 5

⁽i) Co. Litt. 13. (k) Feud. 1. 2. 1. 86. (l) 4. Inst. 192. (m) Litt. §. 153. (n) Ibid. §. 158.

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only he was not bound to pay aid (0), or escuage (p), and, when tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little (q). Tenure by cornage, which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty (r).

THESE fervices, both of chivalry and grand ferjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by affestiment, at so much for every knight's fee; and therefore this kind of tenure was called scutagiumin Latin, or fer-vitium scuti; scutum being then a well-known denomination of money: and, in like manner it was called, in our Norman French, escuage; being indeed a pecuniary, instead of a military, service. The first time this appears to have been taken was in the 5 Hen. II. on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our antient histories that, from this period, when our king's went to war, they levied scutages on their tenants, that is, 'on all the landholders of the kingdom, to defray their expenses, and to hire troops: and these affessments, in the time of Henry II. feem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his fuccessors, it became matter of national clamour; and king John was obliged to confent, by his magna carta, that no scutage should be imposed without consent of parliament (s). But this clause was omitted in his son Henry III's charter; where we only find (t), that scutages or escuage should be taken

⁽o) 2 Inst. 233. (p) Litt. §. 158. (q) Ibid. §. 154. (l) Ibid. §. 156. (s) Nullum scutagium ponatur in regnon fro, 11/2 per commune consilium regni nostri. cap 12. (t) cap. 37.

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taken as they were used to be taken in the time of Henry II; that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I. c. 5 & 6. and many subsequent statutes (u) it was enacted, that the king should take no aids or tasks but by the common assent of the realm. Hence it is held in our old books, that escuage or scutage could not be levied but by consent of parliament (w); such scutages being indeed the groundwork of all succeeding subsidies, and the landtax of later times.

SINCE therefore escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton (x) must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected (y) as a tenure in chivalry (z). But as the actual service was uncertain, and depended upon emergences, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the affestments of the legislature suited to those emergences. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure, instead of knight-fervice, would have then been of another kind, called focage (a) of which we shall speak in the next chapter.

For the present, I have only to observe, that by the degenerating of knight-service, or personal military duty, into scaage, or pecuniary affessment, all the advantages (either promised or real) of the feodal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths,

⁽u) See Vol. I. pag. 140. (w) Old Ten. tit. Escuage. (x) 103. (y) Wright, 122. (z) Pro seedo militari reputatur. Flet. l. 2. c. 14. § 7. (a) Litt. § 97. 120.

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to defend their king and country, the whole of this fystem of tenures now tended to nothing elfe, but a wretched means of raifing money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groan. ed under the intolerable burthens, which (in confequence of the fiction adopted after the conquest) were introduced and laid upon them by the fubtlety and fineffe of the Norman lawyers. For, befides the foutages to which they were liable in defect of personal attendance, which however were affested by themselves in parliament, they might be called upon by the king or lord paramount for aids, whenever his eldeft fon was to be knighted, or his eldest daughter married; not to forget the ranfom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arifing from his inheritance, by way of relief and primer feifin; and, if under age, of the whole of his estate during infancy. And then, as fir Thomas Smith (b) very feelingly complains, " when he came to his own, after he was " out of ward bib, his woods decayed, houses fallen down, " flock wasted and gone, lands let forth and ploughed to be "barren," to make amends he was yet to pay half a year's profits as a fine for fuing out his livery; and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this, the untimely and expensive honour of knighthood, to make his poverty more completely splendid. And when by these deductions his fortune was fo shattered and ruined, that perhaps he was obliged to fell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a licence or alienation.

A SLAVERY so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of her freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances, Till at length the humanity of king James I. consented (c) for a proper

⁽b) Commonw. 1. 3. c. 5. (c) 4 Inft. 202.

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a proper equivalent to abolish them all; though the plan then proceeded not to effect : in like manner as he had formed a scheme, and began to put it in execution, for removing the feodal grievance of heretable jurisdictions in Scotland (d). which has fince been pursued and effected by the statute 20 Geo. II. c. 43 (e). King James's plan for exchanging our military tenures feems to have been nearly the fame as that which has been fince purfued; only with this difference, that by way of compensation for the loss which the crown and other lords would futtain, an annual feefarm rent would be fettled and inseparably annexed to the crown, and affured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient, seemingly much hetter than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages. were destroyed by one blow by the statute 12 Car. II. c. 24. which enacts, " that the court of wards and liveries, and all "wardships, liveries, primer seisins, and ousterlemains, va-"lues and forfeitures of marriages, by reason of any tenure of "the king or others, be totally taken away. And that all "fines for alienations, tenures by homage, knights-fervice. "and escuage, and also aids for marrying the daughter or " knighting the fon, and all tenures of the king in capite, be "likewise taken away. And that all sorts of tenures, held of "the king or others, be turned into free and common focage; " fave only tenures in frankalmoign, copyholds, and the ho-"norary fervices (without the flavish part) of grand serieanty." A statute, which was a greater acquisition to the ivil property of this kingdom than even magna carta itself: ince that only pruned the luxuriances that had grown out of he military tenures, and thereby preserved them in vigour; but the statute of king Charles extirpated the whole, and denolished both root and branches.

CHAPTER

⁽d) Dalrymp. of feuds. 292. (e) By another statute of the ame year (20 Geo. II. c. 50.) the tenure of wardholding (equivate to the knight service of England) is for ever abolished in Scotand.

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CHAPTER THE SIXTH.

OF THE MODERN ENGLISH TENURES.

LTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feodal constitution was happily done away, yet we are not to imagine that the constitution itself was uttery laid afide, and a new one introduced in its room: fince by the statute 12 Car. II. the tenures of socage and frankalmoign, the honorary fervices of grand ferjeanty, and the tenure by copy of court roll were referved; nay all tenures in general, except frankalmoign, grand ferjeanty, and copyhold, were reduced to one general species of tenure, then well known and fubfifting, called free and common focage. And this, being forung from the same feodal original as the rest, demonstrates the necessity of fully contemplating that antient system; fince it is that alone to which we can recur, to explain any feeming or real difficulties, that may arise in our present mode of tenure.

The military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or free-socage, consisted also of free and honourable services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the states)

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tute of Charles the second) almost every other species of tenure. And to this we are next to proceed.

II. SOCAGE, in its most general and extensive fignification, feems to denote a tenure by any certain and determinate fervice. And in this fense it is by our antient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton (a); if a man holds by a rent in money, with any escuage or serjeanty, "id tenementum dici potest socagium :" but if you add thereto any royal fervice, or escuage to any, the smallest, amount, "illud dici poterit feodum militare." So too the author of Fleta (b); " ex donationibus, servitia militaria vel magnae " serjantiae non continentibus, oritur nobis quoddam nomen ge-"nerale, quod est socagium." Littleton also (c) defines it to be, where the tenant holds his tenement of the lord by any tertain service, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore aferwards (d) he tells us, that whatfoever is not tenure in chivalry is tenure in focage: in like manner as it is defined by Finch (e), a tenure to be done out of war. The service nust therefore be certain, in order to denominate it socage; is to hold by fealty and 20s. rent; or, by homage, fealty, and 20s. rent; or, by homage and fealty without rent; or, by fealty and certain corporal fervice, as ploughing the lord's and for three days; or, by fealty only without any other service: for all these are tenures in socage (f).

But socage, as was hinted in the last chapter, is of two sorts: free-socage, where the services are not only certain, but honourable; and villein-socage, where the services, hough certain, are of a baser nature. Such as hold by the sormer tenure are called in Glanvil (g), and other subsequent withors, by the name of liberi sokemanni, or tenants in free-lokage. Of this tenure we are first to speak; and this, both in

⁽a) l. 2. c. 16. §. 9. (b) l. 3. c. 14. §. 9. (c) §. 117. d) § 118. (e) L. 147. (f) Ltt. §. 117, 118, 119. g) l. 3. c. 7.

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in the nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but al. fent to Mr. Somner's etymology of the word (h); who de. rives it from the Saxon appellation, foc, which fignifies liberty or privilege, and, being joined to a usual termination, is called focage, in Latin focagium; fignifying thereby a free or privileged tenure (i). This etymology feems to be much more just than that of our common lawyers in general, who derive it from foca, an old Latin word denoting (as they tell us) a plough: for that in antient time this focage tenure con. fifted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, fow, or reap for him; but that, in process of time, their service was changed into an annual rent by confent of all parties, and that, in memory of its original, it still retains the name of focage or plough-fervice (k). But this by no means agrees with what Littleton himself tells us (1), that to hold by fealty only, without paying any rent, is tenure in focage; for here is plainly no commutation for plough-fervice. Befides, even fervices, confessedly of a military nature and original, (aselcuage itself, which while it remained uncertain was equivalent to knight-fervice) the instant they were reduced to a certainty changed both their name and nature, and were called focage (m). It was the certainty therefore that denominated it a focage tenure; and nothing fure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore also Britton, who describes socage tenure under the name of fraunke ferme (n), tells us, that they are "land " and tenements, whereof the nature of the fee is changed by . feoffment out of chivalry for certain yearly services, and in " respect whereof neither homage, ward, marriage, nor ne " lief can be demanded." Which leads us also to another observation,

⁽h) Gavelk. 138. (i) In like manner Skene in his exposition of the Scots' law, title focage, tells us that it is " ane kind of hold ing of lands, quhen ony man is infelt freely," &c. (k) Litt. §. 119. (l) §. 118. (m) Litt. §. 98, 120. (n) c. 66.

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observation, that, if socage tenures were of such base and serile original, it is hard to account for the very great immunities which the tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reign of both Edward I. and Charles II. a point of the atmost importance and value to the tenants, to reduce the tenure by knight-service to fraunke ferme or tenure by socage. We may therefore, I think, fairly conclude in favour of Sommer's etymology, and the liberal extraction of the tenure in see socage, against the authority even of Littleton himself.

Taking this then to be the meaning of the word, it seems robable that the socage tenures were the relics of Saxon Liverty; retained by such persons, as had neither forfeited hem to the king, nor been obliged to exchange their tenure or the more honourable, as it was called, but at the same me more burthensome, tenure of knight-service. This is eculiarly remarkable in the tenure which prevails in Kent, alled gavelkind, which is generally acknowleged to be a species of socage tenure (0); the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in free and common socage.

As therefore the grand criterion and distinguishing mark f this species of tenure are the having its renders of services scertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, a particular, petit serjeanty, tenure in burgage, and gavelind.

We may remember, that by the statute 12 Car. II. grand rejeanty is not itself totally abolished, but only the slavish apendages belonging to it; for the honorary services (such as arrying the king's sword or banner, officiating as his butler, arver, &c. at the coronation) are still reserved. Now petit injeanty bears a great resemblance to grand serjeanty; for as

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the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person. Petit serjeanty, as defined by Littleton (p), consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow or the like. This, he says (q), is but socage in elsect; for it is no personal service, but a certain rent: and we may add, it is clearly no predial service, or service of the plough, but in all respects liberum et commune socagium; only, being held of the king, it is by way of eminence dignished with the title of parvum servitium regis, or petit serjeanty. And magna carta respects it in this light, when it enacts (r), that no wardship of the lands or body shall be claimed by the king in virtue of a tenure by petit serjeanty.

TENURE in burgage is described by Glanvil (s), and iserpressly said by Littleton (t), to be but tenure in socages and it is where the king or other person is lord of an antient borough, in which the tenants are held by a rent certain (u) It is indeed only a kind of town focage; as common focage, by which other lands are holden, is usually of a rural nature A borough, as we have formerly feen, is diffinguished from other towns by the right of fending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure burgage therefore, or burgage tenure, is where houses, or lands which were formerly the scite of houses, in an antient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their infignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarce have amounted to a knight's fet. Besides, the owners of them, being chiefly artificers and perfons engaged in trade, could not with any tolerable propriety

⁽p) § 159. (q) §. 160. (r) cap. 27. (s) lib. 7. (a) } (t) §. 162. (u) Litt. §. 162, 163.

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put on fuch a military establishment, as the tenure in chidry was. And here also we have again an instance, where tenure is confessedly in socage, and yet could not possibly er have been held by plough-service; since the tenants must ve been citizens or burghers, the fituation frequently a alled town, the tenement a fingle house; so that none of owners was probably mafter of a plough, or was able to e one, if he had it. The free focage therefore, in which ese tenements are held, seems to be plainly a remnant of xon liberty; which may also account for the great variety customs, affecting many of these tenements so held in annt burgage: the principal and most remarkable of which is at called Borough-English, so named in contradistinction as were to the Norman customs, and which is taken notice of Glanvil (w), and by Littleton (x); viz. that the youngest n, and not the eldest, succeeds to the burgage tenement on death of his father. For which Littleton (y) gives this rean; because the youngest son, by reason of his tender age, is tho capable as the rest of his brethren to help himself. Other thors (z) have indeed given a much stronger reason for this flom, as if the lord of the fee had antiently a right to break e seventh commandment with his tenant's wife on her dding-night; and that therefore the tenement descended t to the eldeft, but the youngest son; who was more tainly the offspring of the tenant. But I cannot learn that er this custom prevailed in England, though it certainly did Scotland, (under the name of mercheta or marcheta) till olished by Malcolm III. (a). And perhaps a more rational count than either may be deduced (though at a fufficient dince) from the practice of the Tartars; among whom, acrding to father Duhalde, this custom of descent to the ungest son also prevails. That nation is composed totally hepherds and herdimen; and the elder fons, as foon as ey are capable of leading a pastoral life, migrate from their her with a certain allotment of cattle; and go to feek a new habitation.

⁽w) ubi fupra. (x) §. 165. (y) §. 211. (2) 3 Mod. (2) Seld. tit. of hon. 2. 1. 47. Reg. Mag. 1. 4. c. 31.

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habitation. The youngest son therefore, who continues late with the father, is naturally the heir of his house, the relt to ing already provided for. And thus we find that, among me ny other northern nations, it was the custom for all the for but one to migrate from the father, which one became h heir (b). So that possibly this custom, wherever it prevale may be the remnant of that pastoral state of our British as German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenures : asthat in some, the wife shall be endowed of all her husband's ten ments (c), and not of the third part only, as at the commo law: and that, in others, a man might dispose of his tens ments by will (d), which, in general, was not permitted a ter the conquest, till the reign of Henry the eighth; thou in the Saxon times it was allowable (e). A pregnant pro that these liberties of socage tenure, were fragments of Saxo liberty.

The nature of the tenure in gavelkind affords us a fil stronger argument. It is universally known what struggle the Kentishmen made to preserve their antient liberties; and with how much success those struggles were attended. An as it is principally here that we meet with the custom of gavelkind, (though it was and is to be found in some parts of he kingdom) (f) we may fairly conclude that this was a part those liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman conquest was the general custom of the realm (g). The distinguishing properties of this to nure are various: some of the principal are these; 1. The tenant is of age sufficient to aliene his estate by seoffment at the age of sisteen (h). 2. The estate does not escheat in all of an attainder and execution for felony; this maxim being the father to the bough, the son to the plough (i)." 3.1

⁽b) Pater cunctos filios adultos a sepellebat, praeter unum que haeredem sui juris relinquebat. (Walsingh. Upodigm. Neustr.c. 11, (c) Litt. § 166. (d) § 167. (e) Wright. 172. (f) Stu 32 Hen. VIII. c. 29. Kitch. of courts, 200. (g) In toto regulante ducis adventum, frequens et usitata fuit: postea caeteris admit ta, sed privatis quorundam locorum consuetudinibus alibi postea regerminans: Cantianis selum integra et inviolata remansit. (sui lect. l. 2. c. 7.) (h) Limb. Peramb. 614. (i) Lamb. 634.

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Aplaces he had a power of deviling lands by will, before flatute for that purpose was made (k). 4. The lands dend, not to the eldest, youngest, or any one fon only, but all the fons together (1); which was indeed antiently the Ausual course of descent all over England (m), though in ticular places particular customs prevailed. These, among er properties, diftinguished this tenure in a most remarke manner: and yet it is faid to be only a species of a socage ure; modified by the custom of the country; the lands beholden by fuit of court and fealty, which is a service in its ture certain (n). Wherefore, by a charter of king John (o), bertarch-bishop of Canterbury was authorized to exchange gavelkind tenures holden of the fee of Canterbury into teres by knight-service; and by statute 31 Hen. VIII. c. 3. diffavelling the lands of divers lords and gentlemen in the inty of Kent, they are directed to be descendible for the are like other lands, which were never holden by service of ge. Now the immunities which the tenants in gavelkind oyed were fuch, as we cannot conceive should be conferred on mere ploughmen, or peafants : from all which I think it ficiently clear, that tenures in free focage are in general of obler original than is affigned by Littleton, and after him the bulk of our common lawyers.

HAVING thus distributed and distinguished the several spesof tenure in free socage, I proceed next to shew that this partakes very strongly of the feodal nature. - Which may bably arise from its antient Saxon original; since (as was ore observed) (p) feuds were not unknown among the Sax-, though they did not form a part of their military policy, were drawn out into fuch arbitrary confequences as among Normans. It feems therefore reasonable to imagine, that age tenure existed in much the same state before the conest as after: that in Kent it was preferved with a high id, as our historians inform us it was; and that the rest of the

k) F. N. B. 198. Cro. Car. 561. (1) Litt. §. 210. (m) Glan-1.7. c. 3. 3. (n) Wright, 211. (o) Spelm. cod. wet. leg.

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the socage tenures dispersed through England escaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own insignation ficancy: since I do not apprehend the number of socages nures soon after the conquest to have been very consideral nor their value by any means large; till by successive charter of enfranchisement granted to the tenants, which are past cularly mentioned by Britton (q), their number and value gan to swell so far, as to make a distinct, and justly envis part of our English system of tenures.

HOWEVER this may be, the tokens of their feodal origin will evidently appear from a short comparison of the incident and consequences of socage tenure with those of tenure in divalry; remarking their agreement or difference as we along.

- 1. In the first place, then, both were held of super lords; of the king as lord paramount, and sometimes of subject or mesne lord between the king and the tenant.
- 2. BOTH were subject to the feodal return, render, mor service, of some sort or other, which arose from a supportion of an original grant from the lord to the tenant. In military tenure, or more proper send, this was from its ture uncertain; socage, which was a send of the improper kind, was certain, fixed, and determinate, (though perhaps the perhaps that the send of the improper sen
- 3. BOTH were, from their constitution, universally subjective (over and above all other renders) to the oath of fealty, or a tual bond of obligation between the lord and tenant so which oath of fealty usually draws after it suit to the lord court. And this oath every lord, of whom tenants are hold at this day, may and ought to call upon his tenants to take his court baron: if it be only for the reason given by Litt ton (s), that if it be neglected, it will by long continuance

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hold take Littl ance me grow out of memory (as doubtless it frequently has) where the land be holden of the lord or not; and so he may see his seignory, and the profit which may accrue to him by scheats and other contingencies (t).

4. The tenure in socage was subject, of common right, to ds for knighting the son and marrying the eldest daugher (u): which were fixed by the statute Westm. 1. c. 36. at os. for every 201. per annum so held; as in knight-service. hese aids, as in tenure by chivalry, were originally mere nevolences, though afterwards claimed as matter of right; at were all abolished by the statute 12 Car. II.

5. Relief is due upon socage tenure, as well as upon teare in chivalry; but the manner of taking it is very different. he relief on a knight's fee was 51. or one quarter of the fupfed value of the land; but a focage relief is one year's rent render, payable by the tenant to the lord, be the same eier great or small (w); and therefore Bracton (x) will not low this to be properly a relief, but quaedam praestatio loco levii in recognitionem domini. So too the statute 28 Edw. c. 1. declares, that a free fokeman shall give no relief, but all double his rent after the death of his ancestor, according that which he hath used to pay his lord, and shall not be leved above measure. Reliefs in knight-service were only yable, if the heir at the death of his ancestor was of full e: but in focage they were due, even though the heir was der age, because the lord has no wardship over him (v). he statute of Charles II. reserves the reliefs incident to soge tenures; and therefore, wherever lands in fee simple are lden by a rent, relief is still due of common right upon the ath of the tenant (z).

6. PRIMER

⁽t) Eo maxime praestandum est, ne dubium reddatur jus domini vetustate temporis abscuretur. Corvin. jus seud. l. 2. t. 7.) Co. Litt. 91. (w) Litt. §. 126. (x) l. 2. c. 37. §. 8. bitt. §. 127. (z) Lev, 145.

- 6. PRIMER seisin was incident to the king's socage tenant in capite, as well as to those by knight-service (a). But to pancy in capite as well as primer seisins, are also, among the other seodal burthens, intirely abolished by the statute.
- 7. WARDSHIP is also incident to tenure in socage : butd a nature very different from that incident to knight-fervice, For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor never did, belong to the lon of the fee; because, in this tenure no military or other perfonal fervice being required, there was no occasion for the lord to take the profits, in order to provide a proper fubfitus for his infant tenant : but his nearest relation (to whom their heritance cannot descend) shall be his guardian in socage, an have the custody of his land and body till he arrives at thear of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend; as was fully a plained, together with the reasons for it, in the former book of these commentaries (b). At fourteen this wardship in socas ceases; and the heir may oust the guardian, and call him account for the rents and profits (c): for at this age the land supposes him capable of chusing a guardian for himself. was in this particular, of wardship, as also in that of mariage, and in the certainty of the render or service, that it focage tenures had fo much the advantage of the military ones But as the wardship ceased at fourteen, there was this advantage attending it; that young heirs, being left at so tendera age to chuse their own guardians till twenty one, they migh make an improvident choice. Therefore, when almost a the lands of the kingdom were turned into focage tenures, the fame statute 12 Car. II. c. 24. enacted, that it should be the power of any father by will to appoint a guardian, tilling child should attain the age of twenty one. And, if no sud appointment be made, the court of chancery will frequent interpose, and name a guardian, to prevent an infant he from improvidently exposing himself to ruin.

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⁽a) Co. Litt. 77. (b) page 461. (c) Litt. §. 123 Co. Litt. §

8. MARRIAGE, or the valor marittagii, was not in focage enure any perquifite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for t, unless he married him to advantage (d). For the law, in favour of infants, is always jealous of guardians, and therefore in this case it made them account, not only for what they did, but also for what they might, receive on the infant's behalf; lest by some collusion the guardian should have received the value, and not brought it to account: but the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage a focage tenure were fo diametrically opposite to those in knight-fervice, and fo entirely agree with those parts of king Edward's laws, that were restored by Henry the first's charer, as might alone convince us that focage was of a higher original than the Norman conquest.

9. FINES for alienations were, I apprehend, due for lands solden of the king in capite, by socage tenure, as well as in rase of tenure by knight-service: for the statutes that relate to this point, and sir Edward Coke's comment on them (e), speak generally of all tenants in capite, without making any distinction; though now all fines for alienation are demolished by the statute of Charles the second.

10. ESCHEATS are equally incident to tenure in focage, 1 s hey were to tenure by knight-fervice; except only in gavelind lands, which are (as is before-mentioned) subject to no scheats for felony, though they are to escheats for want of ters (f).

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⁽d) Litt. § 123. (e) 1 Inft. 43. 2 Inft. 65, 66, 67. (f)

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THUS much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and funk into the latter: fo that lords of both forts are now holden by the one univerfal tenure of free and common focage.

THE other grand division of tenure, mentioned by Bracon as cited in the preceding chapter, is that of villenage, as contradiftinguished from liberum tenementum, or frank tenure, And this (we may remember) he fubdivides into two classes, pure and privileged, villenage: from whence have arisen two other species of our modern tenures.

III. FROM the tenure of pure villenage have fprung ou present copyhold tenures, or tenure by copy of court roll at the will of the lord: in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

MANORS are in substance as antient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day (g): just as we observed of feuds, that they were partly known to our ancetors, even before the Norman conquest. A manor, many rium, a manendo, because the usual residence of the owner feems to have been a district of ground, held by lords or gra personages; who kept in their own hands so much land a was necessary for the use of their families, which were called terrae dominicales, or demesne lands; being occupied by the lord, or dominus manerii, and his fervants. The other, tenemental, lands they distributed among their tenants; which from the different modes of tenure were called and diffinguish ed by two different names. First, book-land, or charter-land which was held by deed under certain rents and free fervice and in effect differed nothing from free focage lands (h): 20

⁽g) Co. Cop. §. 2, & 10. (h) Co. Cop. §. 3.

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rom hence have arisen all the freehold tenants which hold of articular manors, and owe fuit and service to the same. The ther species was called folk-land, which was held by no afmance in writing, but distributed among the common folk or eople at the pleasure of the lord, and resumed at his discreon; being indeed land held in villenage, which we shall preently describe more at large. The residue of the manor, beig uncultivated, was termed the lord's waste, and ferved or public roads, and for common pasture to the lord and his nants. Manors were formerly called baronies, as they still re lordships: and each lord or baron was empowered to hold domestic court, called the court-baron, for redressing mismesnors and nusances within the manor, and for settling disites of property among the tenants. This court is an inferable ingredient of every manor; and if the number of fuiis should so fail, as not to leave sufficient to make a jury or mage, that is, two tenants at the least, the manor itself is

BEFORE the statute of quia emptores, 18 Edw. I. the king's eater barons, who had a large extent of territory held unthe crown, granted out frequently smaller manors to infer persons to be held of themselves; which do therefore now ntinue to be held under a superior lord, who is called in h cases the lord paramount over all these manors: and his mory is frequently termed an honour, not a manor, especivif it hath belonged to an antient feodal baron, or hath n at any time in the hands of the crown. In imitation ereof, these inferior lords began to carve out and grant to ers still more minute estates, to be held as of themselves, were so proceeding downwards in infinitum; till the supelords observed, that by this method of subinfeudation they all their feodal profits, of wardships, marriages, and efats, which fell into the hands of these mesne or middle s, who were the immediate superiors of the terre-tenant, im who occupied the land. This occasioned the statute Westm. 3. or quia emptores, 18 Edw. I. to be made; which ets, that upon all fales or feoffments of land, the feoffee

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shall hold the same, not of his immediate feosfor, but of the chief lord of the see, of whom such feosfor himself held it. And from hence it is held, that all manors existing at this day, must have existed by immemorial prescription; or at least ever since the 18 Edw. I. when the statute of quia emptores was made. For no new manor can have been created since that statute: because it is essential to a manor, that there be tenants who hold of the lord, and that statute enacts, that for the future no subject shall create any new tenants to hold of himself.

Now with regard to the folk-land, or estates held in vilenage, this was a species of tenure neither strictly feedal Norman, or Saxon; but mixed and compounded of the all (i): and which also, on account of the heriots that usual attend it, may feem to have formewhat Danish in its compose tion. Under the Saxon government there were, as fir Wil liam Temple speaks (k), a fort of people in a condition downright servitude, used and employed in the most servi works, and belonging, both they, their children, and effect to the lord of the foil, like the rest of the cattle or stock up it. These seem to have been those who held what was call the folk-land, from which they were removeable at the low pleasure. On the arrival of the Normans here, it seems n improbable, that they, who were strangers to any other the a feodal state, might give some sparks of enfranchisement fuch wretched persons as fell to their share, by admitti them, as well as others, to the oath of fealty; which a ferred a right of protection, and raised the tenant to a kind state superior to downright flavery, but inferior to en other condition (1). This they called villenage, and the nants villeins, either from the word vilis, or else, as fir ward Coke tells us (m), a villa; because they lived chief villages, and were employed in ruftic works of the molt did kind: like the Spartan helotes, to whom alone the cul of the lands was configned; their rugged masters, like north

⁽i) Wright, 215. (k) Introd. Hist. Engl. 19. (l) Wi

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northern ancestors, esteemed war the only honourable employment of mankind.

THESE villeins, belonging particularly to lords of manors, were either villeins regardant, that is, annexed to the manor or land; or else they were in gross, or at large, that is, annexed to the person of the lord, and transferrable by deed from he owner to another (n). They could not leave their lord without his permission; but, if they ran away, or were puroined from him, might be claimed and recovered by action. ike beafts or other chattels. They held indeed small portions of land by way of fustaining themselves and families; but it was at the mere will of the lord, who might disposses them whenever he pleased; and it was upon villein services, that s, to carry out dung, to hedge and ditch the lord's demesnes, nd any other the meanest offices (o): and their services were ot only base, but uncertain both as to the time and quanity (p). A villein, in short, was in much the same state with s, as lord Molesworth (q) describes to be that of the boors in Denmark, and Stiernhook (r) attributes also to the traals or aves in Sweden; which confirms the probability of their beng in some degree monuments of the Danish tyranny. A vilin could acquire no property either in lands or goods : but, if epurchased either, the lord might enter upon them, oust the illein, and seise them to his own use, unless he contrived to ispose of them again before the lord had seised them; for the ord had then lost his opportunity (s).

In many places also a fine was payable to the lord, if the illein presumed to marry his daughter to any one without ave from the lord (t): and, by the common law, the lord ight also bring an action against the husband for damages thus purloining his property (u). For the children of vilins were also in the same state of bondage with their parents;

E 3 whence

⁽n) Litt. §. 181. (o) Ibid. §. 172. (p) Ille qui tenet in lenario faciet quicquid ei praeceptum fuerit, nec scire debet sero id sacre delet in crastino, et semper tenebitur ad incerta. (Bracal. 4. tr. 1. c. 28.) (q) c. 8. (r) de jure Suconum 1. 2. 4. (s) Litt. §. 177. (t) Co. Litt. 140. (u) Litt. §. 202.

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whence they were called in Latin, nativi, which gave rife to the female appellation of a villein, who was called a neife (w). In case of a marriage between a freeman and a neife, or a villein and a freewoman, the iffue followed the condition of the father, being free if he was free, and villen if he was villein; contrary to the maxim of the civil law, that partus sequitur ventrem. But no bastard could be hom a villein, because by another maxim of our law he is nelling filius; and as he can gain nothing by inheritance, it wen hard that he should lose his natural freedom by it (x). The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill, or maim his villein (y); though he might heat him with impunity, fince the villein had no action or remedy a law against his lord, but in case of the murder of his ancesto, or the maim of his own person. Neifes indeed had also an appeal of rape, in case the lord violated them by force (z).

VILLEINS might be enfranchifed by manumission, which either express or implied: express; as where a man granta to the villein a deed of manumission (a): implied; as where man bound himself in a bond to his villein for a sum of money granted him an annuity by deed, or gave him an estate infa for life, or years (b); for this was dealing with his villeina the footing of a freeman; it was in some of the instances gir ing him an action against his lord, and in others velting ownership in him entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchifed him (c); for, as the lord migh have a short remedy against his villein, by seising his good (which was more than equivalent to any damages he could be cover) the law, which is always ready to catch at any thin in favour of liberty, prefumed that by bringing this action meant to fet his villein on the same footing with himself, at therefor

⁽w) Litt. §. 187. (x) Ibid. §. 187. 188. (y) Ibid. §. 189. (b) §. 204. (c) §. 208. (c) §. 208.

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therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

VILLEINS, by this and many other means, in process of time gained a confiderable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they became to have in them an interest in many places full as good, in others better than their lords. For the goodnature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enby their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the fame fervices, to hold their lands, in pite of any determination of the lord's will. For, though in general they are still said to hold their estates at the will of the lord, yet it is fuch a will as is agreeable to the custom of the nanor; which customs are preserved and evidenced by the olls of the several courts baron in which they are entered, or tept on foot by the constant immemorial usage of the several nanors in which the lands lie. And, as fuch tenants had nohing to shew for their estates but these customs, and admissins in pursuance of them, entered on those rolls, or the coies of fuch entries witneffed by the steward, they now begano be called tenants by copy of court roll, and their tenure itself copyhold (d).

Thus copyhold tenures, as fir Edward Coke observes (e), Ithough very meanly descended, yet come of an antient house; or, from what has been premised it appears, that copyholders re in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a ustomary right to those estates, which before were held abolutely at the lord's will. Which affords a very substantial E 4 reason

⁽d) F. N. B. 12. (e) Cop. §. 32.

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reason for the great variety of customs that prevail in different manors, with regard both to the descent of the estates and the privileges belonging to the tenants. And these encroachments grew to be fo univerfal, that when tenure in villenage was virtually abolished, (though copyholds were reserved) by the statute of Charles II. there was hardly a pure villein lestin the nation. For fir Thomas Smith (f) testifies, that in all his time, (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were fuch only a had belonged to the bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that " the holy fathers, monks, and friars, had in " their confessions, and especially in their extreme and deadly of fickness, convinced the laity how dangerous a practice! " was, for one christian man to hold another in bondage; h " that temporal men, by little and little, by reason of that " terror in their consciences, were glad to manumit all their " villeins. But the said holy fathers, with the abbots and " priors, did not in like fort by theirs; for they also had a " scruple in conscience to empoverish and despoil the church of fo much, as to manumit fuch as were bond to their churches, " or to the manors which the church had gotten; and h "kept their villeins still." By these several means the go nerality of villeins in the kingdom have long ago sprouted up into copyholders: their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness remaining subject to the same servile conditions and forte tures as before, though, in general, the villein fervices at usually commuted for a small pecuniary quit-rent (g).

⁽f) Commonwealth, p. 3. c. 10. (g) In some manner to copyholders were bound to perform the most service offices, and hedge and ditch the lord's grounds, to lop his trees, to reap his contained the like; the lord usually finding them meat and drink, a sometimes (as is still the use in the highlands of Scotland) a mass strell or piper for their diversion. (Rot. Maner. de Edgware Contained.) As in the kingdom of Whidah, on the slave coals of Africa, the people are bound to cut and carry in the king's contained to the strength of their labour. (Mod. Un. Hist. xvi. 429).

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As a farther consequence of what has been premised, we may collect these two main principles, which are held (h) to be the supporters of a copyhold tenure, and without which it cannot exist; 1. That the lands be parcel of, and situate within, that manor, under which it is held. 2. That they have been demised, or demisable, by copy of court roll immemorially. For immemorial custom is the life of all tenures by copy; fo that no new copyhold can, strictly speaking, be granted at this day.

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are fivled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only: for the guitom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

THE fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services, (as well in rents as otherwise) reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But, besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter, are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardhip in it, when all the goods and chattels belonged to the lord, and he might have seised them even in the villein's lifetime. These are incident to both species of copyhold, but wardship and fines to those of inheritance only. E 5

(h) Co. Litt. 58.

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Wardship, in copyhold estates, partakes both of that in di valry and that in focage. Like that in chivalry, the lord the legal guardian; who usually assigns some relation of the infant tenant to act in his flead: and he, like guardian focage, is accountable to his ward for the profits. Of fine fome are in the nature of primer seisins, due on the death each tenant, others are mere fines for alienation of the lands in some manors only one of these sorts can be demanded in some both, and in others neither. They are sometimes a bitrary and at the will of the lord, fometimes fixed b custom: but, even when arbitrary, the courts of law, in fa vour of the liberty of copyholders, have tied them downt be reasonable in their extent; otherwise they might amoun to a disherison of the estate. No fine therefore is allowed to be taken upon descents and alienations, (unless in particula circumstances) of more than two years improved value the estate (i). From this instance we may judge of thesi vourable disposition that the law of England, (which is ala of liberty) hath always shewn to this species of tenants; b removing, as far as possible, every real badge of slavery from them, however fome nominal ones may continue. It ful fered cuftom very early to get the better of the express term upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the custom of the manor: and, where no custom has been suffered to grown to the prejudice of the lord, as in this case of arbitrary fina the law itself interposes in an equitable method, and will a fuffer the lord to extend his power so far, as to disinherit tenant.

THUS much for the antient tenure of pure villenage, as the modern one of copyhold at the will of the lord, which is neally descended from it.

IV. THERE is yet a fourth species of tenure, described Bracton under the name sometimes of privileged villeng and sometimes of villein-socage. This, he tells us (k), is sufficient to the second of t

⁽i) 2 Ch. Rep. 134. (k) 1. 4. tr. 1. c. 28.

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s has been held of the kings of England from the conquest ownwards; that the tenants herein "villana faciunt serviia, sed certa et determinata;" that they cannot aliene or ansfer their tenements by grant or feosfiment, any more than ure villeins can; but must surrender them to the lord or eward, to be again granted out and held in villenage. And som these circumstances we may collect, that what he here escribes is no other than an exalted species of copyhold, substing at this day, viz. the tenure in antient demesse; to which, as partaking of the baseness of villenage in the nature f its services, and the freedom of socage in their certainty, e has therefore given a name compounded out of both, and alls it villanum socagium.

ANTIENT demesne consists of those lands or manors, hich, though now perhaps granted out to private subjects, ere actually in the hands of the crown in the time of Edard the confessor, or William the conqueror; and so apear to have been by the great furvey in the exchequer called omesday book (1). The tenants of these lands, under the rown, were not all of the fame order or degree. tem, as Britton testifies (m), continued for a long time pure nd absolute villeins, dependent on the will of the lord: and tose who have succeeded them in their tenures now differ com common copyholders in only a few points (n). Others ere in great measure enfranchised by the royal favour: beig only bound in respect of their lands to perform some of te better fort of villein services, but those determinate and ertain; as, to plough the king's land, to supply his court ith provisions, and the like; all of which are now changed to pecuniary rents: and in confideration hereof they had any immunities and privileges granted to them (o); as to y the right of their property in a peculiar court of their wn, called a court of antient demesne, by a peculiar process enominated a writ of right close (p): not to pay toll or xes; not to contribute to the expenses of knights of the lire; not to be put on juries, and the like (q).

THESE

⁽¹⁾ F. N. B 14. 16, (m) c. 66. (n) F. N. B. 228. (0) 4 last, 269. (p) F. N. B. 11. (q) *Ibid.* 14.

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THESE tenants therefore, though their tenure be abso. lutely copyhold, yet have an interest equivalent to a freehold; for, though their fervices were of a base and villenous original (r), yet the tenants were esteemed in all other respects to be highly privileged villeins; and especially in this, that their fervices were fixed and determinate, that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "d ideo, fays Bracton, dicunter liberi." Britton also, from such their freedom, calls them absolutely jokemans, and their tenur fokemanries; which he describes (s) to be " lands and tene-" ments, which are not held by knight-fervice, nor by grand " ferjeanty, nor by petit, but by simple fervices, being as it " were lands enfranchifed by the king or his predeceffors from " their antient demesne." And the same name is also given them in Fleta (t). Hence Fitzherbert observes (u), that no lands are antient demesne, but lands holden in socage: that is, not in free and common focage, but in this amphibious, fubordinate class, of villein-socage. And it is possible, that as this species of socage tenure is plainly founded upon predial fervices, or fervices of the plough, it may have given cause to imagine that all focage tenures arose from the same original for want of distinguishing, with Bracton, between free-socage or focage of frank-tenure, and villein-focage or focage of an tient demefne.

copyhold, and as such preserved and exempted from the operation of the statute of Charles II. Yet they differ from common copyholds, principally in the privileges before-mentioned: as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton and remaining to this day; viz. that they cannot be conveyed from man to man by the general common law conveyance of feossment, and the rest; but must pass by surrender to the lord or his steward, in the manner of common copyholds.

⁽r) Gilb. hist, of the exch. 16. & 30. (s) c. 66. (t) 1.1 c. 8. (u) F. N. B. 13.

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olds: yet with this difference (w), that, in the furrenders of these lands in antient demesne, it is not used to say "to bold at the will of the lord" in their copies, but only "to bold according to the custom of the manor."

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both anient and modern, in which we cannot but remark the mutual onnexion and dependence that all of them have upon each ther. And upon the whole, it appears, that, whatever changes and alterations these tenures have in process of time undergone, from the Saxon æra to the 12 Car. II. all lay tenures are now a effect reduced to two species; free tenure in common soage, and base tenure by copy of court roll.

I MENTIONED lay tenures only; because there is still beind one other species of tenure, reserved by the statute sharles II. which is of a spiritual nature, and called the teure in frank-almoign.

V. TENURE in frankalmoign, in libera eleemofynd, or free ms, is that, whereby a religious corporation, aggregate or le, holdeth lands of the donor to them and their successors The fervice, which they were bound to render r ever (x). or these lands was not certainly defined: but only in general pray for the fouls of the donor and his heirs, dead or alive: nd therefore they did no fealty, (which is incident to all other tvices but this) (y) because this divine service was of a higher d more exalted nature (z.) This is the tenure, by which most all the antient monasteries and religious houses held eir lands; and by which the parochial clergy, and very any ecclefiastical and eleemosynary foundations, hold them this day (a); the nature of the fervice being upon the remation altered, and made conformable to the purer doctrines

⁽w) Kitchen on courts, 194. (x) Litt. §. 133. (y) Ibid. (2) Ibid. 135. (a) Bracton. l. 4. tr. 1. c. 28. §. 1.

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trines of the church of England. It was an old Saxon tenur: and continued under the Norman revolution, through the great respect that was shewn to religion and religious mening antient times. Which is also the reason that tenants in frank almoign were discharged of all other services, except the trinoda necessitas, of repairing the highways, building castles, and repelling invafions (b): just as the Druids, among the antient Britons, had omnium rerum immunitatem (c). And even at present, this is a tenure of a nature very distinct from all others; being not in the least feodal, but merely spiritual For if the service be neglected, the law gives no remedy b distress or otherwise to the lord of whom the lands are holden but merely a complaint to the ordinary or visitor to correl it (d). Wherein it materially differs from what was called tenure by divine fervice: in which the tenants were obliga to do some special divine services in certain; as to sing s many maffes, or distribute such a sum in alms, and the like which, being expressly defined and prescribed, could with a kind of propriety be called free alms; especially as for this if unperformed, the lord might diffrein, without any com plaint to the vifitor (e). All fuch donations are indeed no out of use: for, fince the statute of quia emptores, 18 Edw. none but the king can give lands to be holden by this to nure (f). So that I only mention them, because franka moign is excepted by name in the statute of Charles II. at therefore subsists in many instances at this day. Which all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.

(b) Seld. Jan. 1. 42. (c) Cæsar de bell. Gall. l. 6. 6. 1 (d) Litt. §. 136. (e) Ibid. 137. (f) Ibid. 140

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CHAPTER THE SEVENTH.

OF FREEHOLD ESTATES, OF INHERITANCE.

HE next objects of our disquisitions are the nature and properties of estates. An estate in lands, tenements, and hereditaments, signifies such interest as the tenant hath terein: so that if a man grants all bis estate in Dale to A and is heirs, every thing that he can possibly grant shall pass tereby (a). It is called in Latin, status; it signifying the midition, or circumstance, in which the owner stands, with gard to his property. And, to ascertain this with proper recision and accuracy, estates may be considered in a three-lidview: first, with regard to the quantity of interest which the mant has in the tenement: secondly, with regard to the me at which that quantity of interest is to be enjoyed: and indly, with regard to the number and connexions of the mants.

FIRST, with regard to the quantity of interest which the mant has in the tenement, this is measured by its duration indextent. Thus, either his right of possession is to subsist or an uncertain period, during his own life, or the life of mother man; to determine at his own decease, or to remain his descendants after him: or it is circumscribed within a stain number of years, months, or days: or, lastly, it is sainte and unlimited, being vested in him and his representa-

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tives for ever. And this occasions the primary division of estates, into such as are freehold, and such as are less than freehold.

An estate of freehold, liberum tenementum, or franktene. ment, is defined by Britton (b) to be " the possession of the " foil by a freeman." And St. Germyn (c) tells us, that "the " possession of the land is called in the law of England the " franktenement or freehold." Such therefore, and noother as requires actual possession of the land, is legally speak ing freehold: which actual possession can, by the count of the common law, be only given by the ceremony called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this description of a freehold; that it is fuch an estate in lands as is con veyed by livery of feifin; or, in tenements of an incorporate real nature, by what is equivalent thereto. And according it is laid down by Littleton (d), that where a freehold ha pass, it behoveth to have livery of seisin. As therefore estate of inheritance and estates for life could not by common laws conveyed without livery of feifin, these are properly estates freehold; and, as no other estates were conveyed with the fame folemnity, therefore no others are properly freeho estates.

ESTATES of freehold then are devisable into estates of interitance, and estates not of inheritance. The former are against divided into inheritances absolute or fee-simple; and inheritances limited, one species of which we usually call fee-tail

I. TENANT in fee-simple (or, as he is frequently style tenant in fee) is he that hath lands, tenements, or her ditaments, to hold to him and his heirs for ever (e); gen rally, absolutely, and simply; without mentioning what he but referring that to his own pleasure, or to the disposition the law. The true meaning of the word fee (feodum) is fame with that of feud or fief, and in its original sense.

⁽b) c. 32. (c) Dr. & Stud. b. 2. d. 22. (d) § (e) Litt. § 1.

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akenin contradistinction to allodium (f); which latter the wriers on this subject define to be every man's own land, which e possesset merely in his own right, without owing any rent r service to any superior. This is property in its highest deree; and the owner thereof hath absolutem et directum doinium, and therefore is faid to be seised thereof absolutely in bminico fuo, in his own demesne. But feodum, or fee, is that which is held of some superior, on condition of rendering him ervice; in which superior the ultimate property of the land endes. And therefore fir Henry Spelman (g) defines a feud r fee to be the right which the vafal or tenant hath in lands, use the same, and take the profits thereof to him and his eirs, rendering to the lord his due services; the mere alloial property of the foil always remaining in the lord. This llodial property no subject in England has (h); it being a reeived, and now undeniable, principle in the law, that all he lands in England are holden mediately or immediately of he king. The king therefore only hath absolutum et direcum dominium (i): but all subjects' lands are in the nature of endum or fee; whether derived to them by descent from their ncestors, or purchased for a valuable consideration: for they annot come to any man by either of those ways, unless acompanied with those feodal clogs, which were laid upon the ift feudatory when it was originally granted. A subject herefore hath only the usufruct, and not the absolute proerty of the foil; or, as fir Edward Coke expresses it (k), he ath dominium utile, but not dominium directum. And hence tis that, in the most solemn acts of law, we express the trongest and highest estate, that any subject can have, by hese words; "he is seised thereof in bis demesne, as of fee." tis a man's demesne, dominicum, or property, since it beongs to him and his heirs for ever: yet this dominicum, proerty, or demesne, is strictly not absolute or allodial, but valified or feodal: it is his demesine, as of fee; that is, it is ot purely and fimply his own, fince it is held of a superior ord, in whom the ultimate property resides.

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⁽f) See pag. 45, 47. (g) of feuds, c. 1. (h) Co. Litt. r.
i) Praedium domini regis est directum dominium, cujus nullus est
uiter nissi Deus. 1bi.s. (k) Ibid.

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(r) C Ibid

THIS is the primary fense and acceptation of the words But (as fir Martin Wright very justly observes) (1) the day trine, "that all lands are holden," having been for fo ma ages a fixed and undeniable axiom, our English lawyers very rarely (of late years especially) use the word fee in this primary original fense, in contradistinction to allodium ora folute property, with which they have no concern; but nerally use it to express the continuance or quantity of ela A fee therefore, in general, fignifies an estate of inheritance being the highest and most extensive interest that a man have in a feud: and, when the term is used simply, with out any other adjunct, or has the adjunct of fimple annex to it, (as, a fee, or a fee-simple) it is used in contradistin tion to a fee conditional at the common law, or a fee-tail the statute; importing an absolute inheritance, clear of a condition, limitation, or restrictions to particular heirs, h descendable to the heirs general, whether male or femal lineal or collateral. And in no other sense than this is thekin said to be seised in fee, he being the feudotary of no man (m

TAKING therefore fee for the future, unless where other wise explained, in this its secondary sense, as a state of interitance, it is applicable to, and may be had in, any kind thereditaments either corporeal or incorporeal (n). But the is this distinction between the two species of hereditaments that, of a corporeal inheritance a man shall be said to be self in his demessive, as of see; of an incorporeal one he shall on be seised as of see, and not in his demessive (o). For, as a corporeal hereditaments are in their nature collateral to, a siffue out of, lands and houses (p), their owner hath no property, dominicum, or demessive, in the thing itself, but he only something derived out of it; resembling the serviture or services, of the civil law (q). The dominicum or pro-

⁽¹⁾ Of tenements. 148. (m) Co. Litt. 1. (n) Feedung quod quis tenet sibi et haeredibus suis, sive sit tenementum, sive ditus, &c. Flet. 1. 5. c. 5. §. 7. (o) Litt. §. 10. (p) Spage 20. (q) Servitus est jus, quo res mea alterius rei vel per nae servit. Ff. 8. 1. 1.

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rty is frequently in one man, while the appendage of service in another. Thus Gaius may be seised as of fee, of a way ing over the land, of which Titius is seised in his demesse of fee

THE fee-simple or inheritance of lands and tenements is gerally vested and resides in some person or other; though vers inferior estates may be carved out of it. As if one ants a lease for twenty one years, or for one or two lives, e fee-simple remains vested in him and his heirs; and after edetermination of those years or lives, the land reverts to egrantor or his heirs, who shall hold it again in fee-simple.

et sometimes the fee may be in abeyance, that is (as the word nifies) in expectation, remembrance, and contemplation in w; there being no person in ese, in whom it can vest and ide; though the law confiders it as always potentially exing, and ready to vest whenever a proper owner appears. hus, in a grant to John for life, and afterwards to the irs of Richard, the inheritance is plainly neither granted to hinor Richard, nor can it vest in the heirs of Richard till death, nam nemo est haeres viventis: it remains therefore waiting, or abeyance, during the life of Richard (r). This likewise always the case of a parson of a church, who hath ly an estate therein for the term of his life: and the inheriace remains in abeyance (s). And not only the fee, but the ehold also, may be in abeyance; as, when a parson dies, freehold of his glebe is in abeyance, until a fuccessor be med, and then it vests in the successor (t).

THE word, heirs, is necessary in the grant or donation in der to make a fee, or inheritance. For if land be given to man for ever, or to him and his assigns for ever, this vests him but an estate for life (u). This very great nicety about insertion of the word "heirs" in all feossments and grants, order to vest a fee, is plainly a relic of the feodal strictness: which we may remember (w) it was required, that the

⁽s) Co. Litt. 342. (s) Litt. §. 646. (t) Ibid. §. 647.

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form of the donation should be punctually pursued; or that as Crag (x) expresses it, in the words of Baldus, "donate ones sint stricti juris, ne quis plus donasse praesumate quam in donatione expresserit." And therefore, as the personal abilities of the donee were originally supposed to be the only inducement to the gift, the donee's estate in the lan extended only to his own person, and subsisted no longer that his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also this heirs. But this rule is now softened by many exceptions (y)

FOR, 1. It does not extend to devices by will; in which as they were introduced at the time when the feodal rigor w apace wearing out, a more liberal construction is allowed and therefore by a devise to a man for ever, or to one and h assigns for ever, or to one in fee-simple, the devisee hatha estate of inheritance; for the intention of the devisor is suff ciently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if thed vise be to a man and his affigns, without annexing words perpetuity, there the device shall take only an estate for life for it does not appear that the devisor intended any mor 2. Neither does this rule extend to fines or recoveries, con dered as a species of conveyance; for thereby an estate in fi passes by act and operation of law without the word "heirs as it does also, for particular reasons, by certain other m thods of conveyance, which have relation to a former gra or estate, wherein the word "heirs" was expressed (2). In creations of nobility by writ, the peer so created hath inheritance in his title, without expressing the word, " heirs for they are implied in the creation, unless it be etherwise specially provided: but in creations by patent, which firicti juris, the word " heirs" must be inserted, otherwi there is no inheritance. 4. In grants of lands to fole corpor tions and their fucceffors, the word "fucceffors" fuppli the place of " heirs;" for as heirs take from the ancestor, doth the fuccessor from the predecessor. Nay, in a gra

⁽x) 1. 1. 1. 5. §. 17. (y) Co. Litt. 9, 10. (z) lbid.

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habishop, or other sole spiritual corporation, in frankaloign, the word "frankalmoign" supplies the place of both heirs" and "successors," ex vi termini; and in these cases see-simple vests in such sole corporation. But in a grant of ands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for, albeit such simple rant be strictly only an estate for life, yet, as that corporation ever dies, such estate for life is perpetual, or equivalent to a e-simple, and therefore the law allows it to be one (a). assly, in the case of the king, a fee-simple will vest in him, without the words "heirs" or "successors" in the grant; artly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never ies (b). But the general rule is, that the word "heirs" is exessary to create an estate of inheritance.

II. WE are next to confider limited fees, or such estates of theritance as are clogged and confined with conditions, or valifications, of any sort. And these we may divide into wo sorts: 1. Qualified, or base fees; and 2. Fees conditional, o called at the common law; and afterwards fees-tail, in onsequence of the statute de donis.

1. A BASE, or qualified, fee is such a one as has a qualificaion subjoined thereto, and which must be determined whenever
he qualification annexed to it is at an end. As, in the case of
grant to A and his hers, tenants of the manor of Dale; in
his instance, whenever the heirs of A cease to be tenants of
hat manor, the grant is entirely defeated. So, when Henry VI.
granted to John Talbot, lord of the manor of Kingston-Liste
in Berks, that he and his heirs, lords of the said manor, should
be peers of the realm, by the title of barons of Liste; here
sohn Talbot had a base or qualified fee in that dignity (c); and
the instant he or his heirs quitted the seignory of this manor,

⁽a) See Vol. I. pag. 484. (b) Ibid. 249. (c) Co. Litt. 27.

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the dignity was at an end. This estate is a fee, because by possibility it may endure for ever in a man and his heirs; ya as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

2. A CONDITIONAL fee, at the common law, was a feen strained to some particular heirs, exclusive of others: "done " tio firicta et coarctata (d); sicut certis baeredibus, quibusdan " a successione exclusis:" as, to the heirs of a man's body, b which only his lineal descendants were admitted, in exclusion of collateral heirs; or, to the heirs male of his body, in exclufion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or inplied in the donation of it, that if the donee died without fuch particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatfoever that on failure of the heirs specified in the grant, the gran should be at an end, and the land return to its antient proprietor (e). Such conditional fees were flrictly agreeable the nature of feuds, when the first ceased to be mere estate for life, and were not yet arrived to be absolute estates in fet fimple. And we find ftrong traces of these limited, conditions fees, which could not be alienated from the lineage of the first purchaser, in our earliest Saxon laws (f).

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that should revert to the donor, if the donee had no heir of his body, but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue Now we must observe, that, when any condition is personned, it is thenceforth intirely gone; and the thing, to which

⁽d) Flet. l. 3. c. §. 5. (e) Plowd. 241. (f) Si quis terra haereditariam habeat, eam non wendat a cognatis haeredibus suit si illi viro prohibitum sit, qui eam ab initio acquissivit, ut ita facti nequeat. LL. Aelfred. c. 37.

1. 7. sbefore annexed, becomes absolute, and wholly unconditial. So that, as foon as the grantee had any iffue born, his ate was supposed to become absolute, by the performance the condition; at least, for these three purposes: 1. To enathe tenant to aliene the land, and thereby to bar not only own iffue, but also the donor of his interest in the rever-1(g). 2. To subject him to forfeit it for treason: which he ld not do, till issue born, longer than for his own life; thereby the inheritance of the issue, and reversion of the or, might have been defeated (h). 3. To empower him to rge the land with rents, commons, and certain other inmbrances, fo as to bind his iffue (i). And this was ught the more reasonable, because, by the birth of issue, the libility of the donor's reversion was rendered more distant precarious: and his interest seems to have been the only which the law, as it then stood, was solicitous to protect; hout much regard to the right of fuccession intended to be ed in the iffue. However, if the tenant did not in fact ne the land, the course of descent was not altered by this formance of the condition; for if the iffue had afterwards t, and then the tenant, or original grantee, had died, hout making any alienation; the land, by the terms of donation, could descend to none but the heirs of his , and therefore, in default of them, must have reverted he donor. For which reason, in order to subject the lands he ordinary course of descent, the donees of these condial fee-simples took care to aliene as soon as they had perned the condition by having iffue; and afterwards re-purfed the lands, which gave them a fee-simple absolute, that ald descend to the heirs general, according to the course he common law. And thus stood the old law with regard conditional fees: which things, fays fir Edward Coke (k), igh they seem antient, yet are necessary to be known; as for the declaring how the common law stood in such s, as for the fake of annuities, and fuch like inheritances, are not within the statutes of entail, and therefore remain tthe common law.

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⁽h) Co. Litt. 19. 2 Inst. 233. (h) (i) Co. Litt. 19. (k) 1 Inst. 19. (h) Co. Litt. ibid. 2 Inft.

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THE inconveniences, which attended these limited and se tered inheritances, were probably what induced the judges give way to this subtle finesse, (for such it undoubtedly wa in order to shorten the duration of these conditional estate But, on the other hand, the nobility, who were willing topen tuate their possessions in their own families, to put a stop this practice, procured the statute of Westminster the cond (1) (commonly called the statute de donis conditionalibre to be made; which paid a greater regard to the private w and intentions of the donor, than to the propriety of fuchi tentions, or any public confiderations what foever. This tute revived in some sort the antient feodal restraints whi were originally laid on alienations, by enacting, that for thenceforth the will of the donor be observed; and that tenements fo given (to a man and the heirs of his body) flow at all events go to the iffue, if there were any; or, if no should revert to the donor.

UPON the construction of this act of parliament, the judge determined that the donee had no longer a conditional so simple, which became absolute and at his own disposal, the stant any issue was born; but they divided the estate into the parts, leaving in the donee a new kind of particular estawhich they denominated a fee-tail (m); and vesting in the sonor the ultimate fee-simple of the land, expectant on the slure of issue; which expectant estate is what we now call reversion (n). And hence it is that Littleton tells us so that tenant in fee-tail is by virtue of that the statute of Westinster the second.

HAVING thus shewn the original of estates-tail, I nowp ceed to consider, what things may, or may not, be entailed

^{(1) 13} Edw. I c. 1. (m) The expression fee-tail, or fee talliatum, was borrowed from the seudists; (See Crag. l. 1.1 § 24, 25.) among whom it signified any mutilated or truncated heritance, from which the heirs general were cut off; being deved from the barbarous verb taliare, to cut; from which the free tailler and the Italian tagliare are formed. (Spelm. Gloss. 31 (n) 2. Inst. 335. (o) § 13.

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er the statute de donis. Tenements is the only word used in effatute: and this fir Edward Coke (p) expounds to comchend all corporeal hereditaments whatfoever; and affo all corporeal hereditaments which favour of the realty, that is, hich iffue out of corporeal ones, or which concern, or are nexed to, or may be exercised within the same; as, rents, lovers, commons, and the like. Also offices and dignities, hich concern lands, or have relation to fixed and certain aces, may be entailed (q). But mere personal chattels, which your not at all of the realty, cannot be entailed. Neither n an office, which merely relates to fuch personal chattels, r an annuity, which charges only the person, and not the nds, of the grantor. But in them, if granted to a man and theirs of his body, the grantee hath still a fee conditiolat common law, as before the statute; and by his alienan may bar the heir or reversioner (r). An estate to a man d his heirs for another's life cannot be entailed (s); for this strictly no estate of inheritance (as will appear hereafter) d therefore not within the statute de donis. Neither can a pyhold estate be entailed by virtue of the statute; for that ould tend to encroach upon and restrain the will of the lord: t, by the special custom of the manor, a copyhold may be lited to the heirs of the body (t); for here the custom ascerns and interprets the lord's will.

NEXT, as to the several species of estates-tail, and how they respectively created. Estates-tail are either general, or real. Tail-general is where lands and tenements are given one and the heirs of his body begotten: which is called tailneral, because, how often soever such done in tail be mard, his issue in general by all and every such marriage is, in coeffive order, capable of inheriting the estate-tail, per form doni (u). Tenant in tail-special is where the gift is resided to certain heirs of the donee's body, and does not go all of them in general. And this may happen seve-Vol. II.

o) t Inft, 19, 20. (q) 7 Rep. 33. (t) C Litt, 19, 20. (t) 2 Vern. 225. (t) 3 Rep. 8. (u) Litt. § 14, 15.

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ral ways (w). I shall instance in only one; as where land and tenements are given to a man and the beirs of a body, on Mary his now wife to be begotten: here no issue inherit, but such special issue as is engendered between the two; not such as the husband may have by another wife and therefore it is called special tail. And here we may serve, that the words of inheritance (to him and his being give him an estate in fee; but they being heirs to be by he begotten, this makes it a fee-tail; and the person being also mited, on whom such heirs shall be begotten (viz. Mary) present swife) this makes it a fee-tail special.

ESTATES, in general and special tail, are farther diveriff by the distinction of sexes in such entails; for both of the may either be in tail male or tail female. As if lands begin to a man, and his heirs male of his body begotten, this is estate in tail male general; but if to a man and the heirs male of his body on his present wife begotten, this is an ele in tail female special. And, in case of an entail male, heirs female shall never inherit, nor any derived from the nor, e converso, the heirs male, in case of a gift in tall Thus, if the donee in tail male hath a daught who dies leaving a fon, fuch grandfon in this case cannot in rit the estate-tail; for he cannot deduce his descent who by heirs male (y). And as the heir male must convey his fcent wholly by males, fo must the heir female wholly by males. And therefore if a man hath two estates-tail, the in tail male, the other in tail-female; and he hath in daughter, which daughter hath iffue a fon; this grand can fucceed to neither of the estates: for he cannot convey descent wholly either in the male or female line (z).

As the word *heirs* is necessary to create a fee, so, in fart imitation of the strictness of the feodal donation, the words or some other words of procreation, are necessary to make

⁽w) Litt. §. 16, 26, 27, 28, 29. (x) Ibid. §. 21, 22. Ibid. §. 24. (z) Co. Litt. 25.

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fee-tail, and ascertain to what heirs in particular the fee is limited. If therefore either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his is if ue of his body, to a man and his seed, to a man and his children, or offspring; all these are only estates for life, there wanting the words of inheritance, his heirs (a). So, on the other hand, a gift to a man, and his heirs male, or semale, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue (b). Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his seed, or to a man and his heirs male; or by other irregular modes of expression (c).

THERE is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates in libero maritagio, or frankmarriage. These are defined (d) to be, where tenements are given by one man to another, together with a wife, who is the daugher or cousin of the donor, to hold in frankmarriage. Now by fuch gift, though nothing but the word frankmarriage is expressed, the donees shall have the tenements to them. and the heirs of their two bodies begotten; that is, they are enants in special tail. For this one word, frankmarriage, loes ex vi termini not only create an inheritance, like the word frankalmoign, but likewise limits that inheritance; suplying not only words of descent, but of procreation also. such donees in frankmarriage are liable to no fervice but ealty: for a rent referved thereon is void, until the fourth legree of confanguinity be past between the issues of the donor and donee (e).

THE incidents to a tenancy in tail, under the statute Westm. 2. are chiefly these (f). 1. That a tenant in tail may ommit waste on the estate-tail, by selling timber, pulling F 2 down

⁽a) Co. Litt. 20. (b) Litt. § 31. Co. Litt. 27. (c) Co. litt. 9. 27. (d) Litt. §. 17. (e) Ibid. §. 19, 20. (f) Co. Litt. 224.

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down houses, or the like, without being impeached, or called to account, for the same. 2. That the wife of the tenant in tail shall have her dower, or thirds, of the estate-tail. 3. That the husband of a semale tenant in tail may be tenant by the curtesy of the estate tail. 4. That an estate-tail may be barred, or destroyed, by a sine, by a common recovery, or by lineal warranty descending with assets to the heir. All which will hereafter be explained at large.

THUS much for the nature of estates-tail; the establish. ment of which family law (as it is properly stiled by Pigott(g) occasioned infinite difficulties and disputes (h). Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for if fuch leafes had been valid, then under colour of long leafes the iffue might have been virtually difinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his iffue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of fuits in consequence of which our antient books are full: and treafons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded as the fource of new contentions, and mischiefs unknown to the common law; and almost universally confidered as the common grievance of the realm (i). But, as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature; and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

ABOUT two hundred years intervened between the making of the statute de donis, and the application of common recoveries to this intent, in the twelfth year of Edward IV: which were then openly declared by the judges to be a sufficient

⁽g) Com. Recor. 5. (h) 1. Rep. 131. (i) Co. Litt. 19. Moor. 156. 10. Rep. 38.

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cient bar of an estate-tail (k). For though the courts had, fo long before as the reign of Edward III. very frequently hinted their opinion that a bar might be effected upon thefe principles (1), yet it never was carried into execution; till Edward IV. observing (m) (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the fanctuary of entails, gave his countenance to this proceeding, and fuffered Taltarum's case to be brought before the court (n): wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery fuffered by tenant in tail should be an effectual destruction hereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to he estate-tail, must be reserved to a subsequent enquiry. resent I shall only say, that they are fictitious proceedings, attroduced by a kind of pia fraus, to elude the statute de dois, which was found so intolerably mischievous, and which yet me branch of the legislature would not then consent to repeal: nd, that these recoveries, however clandestinely begun, are low become, by long use and acquiescence, a most common furance of lands; and are looked upon as the legal mode of onveyance, by which tenant in tail may dispose of his lands nd tenements: fo that no court will fuffer them to be taken or reflected on, and even acts of parliament (o) have y a fidewind countenanced and established them.

This expedient having greatly abridged estates-tail with egard to their duration, others were soon invented to strip tem of other privileges. The next that was attacked was teir freedom from forfeitures for treason. For, notwith-anding the large advances made by recoveries, in the consist of about threescore years, towards unfettering these incritances, and thereby subjecting the lands to forseiture, the rapacious prince then reigning, sinding them frequently

(k) 1 Rep. 131. 6 Rep. 40. (l) 10 Rep. 37, 38. (m)

20tt. 8. (n) Year Book. 12 Edw. IV. 14.19. Fitzh. Abr. tit.

14. 70c0v. 20. Bro. Abr. ibid. 35. tit. 70c0v. in value. 19 tit.

16. 36. (o) 11 Hen VII. c. 20. 7 Hen. VIII. c. 4. 34 & Hen. VIII. c. 20. 14 Eliz. c. 8. 4 & 5 Ann. c. 16. 14 Geo.

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re-settled in a similar manner to suit the convenience of samilies, had address enough to procure a statute (p), whereby all estates of inheritance (under which general words estatestail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

THE next attack which they suffered, in order of time, was by the fatute 32 Hen. VIII. c. 28. whereby certain leases made by tenants in tail, which do not tend to the prejudice of the iffue, were allowed to be good in law, and to bind the iffue in tail. But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines (q), by the statute 32 Hen, VIII. c. 36. which declares a fine duly levied by tenant in tail to be a compleat bar to him and his heirs, and all other perfons, claiming under fuch entail. This was evidently agreeabled the intention of Henry VII. whose policy it was (before common recoveries had obtained their full strength and authority to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his me bles. But as they, from the opposite reasons, were not es fily brought to confent to fuch a provision, it was therefor couched, in his act, under covert and obscure expressions And the judges, though willing to conftrue that statute a favourably as possible for the defeating of entailed estates, yo hefitated at giving fines so extensive a power by mere impli cation, when the flatute de donis had expressly declared, that they should not be a bar to estates-tail. But the statute of Henry VIII. when the doctrine of alienation was better to ceived, and the will of the prince more implicitly obeyt than before, avowed and established that intention. Yet, i order to preferve the property of the crown from any dange of infringement, all eftates-tail created by the crown, and which the crown has the reversion, are excepted out of the statute. And the same was done with regard to common to coveries, by the statute 34 & 35 Hen. VIII. c. 20. white enacts, that no feigned recovery had against tenants in tal

⁽p) 26 Hen. VIII. c. 13. (q) 4 Hen. VII. c. 24.

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here the estate was created by the crown (r), and the renainder or reversion continued still in the crown, shall be of ny force or effect. Which is allowing, indirectly and colterally, their full force and effect with respect to ordinary tates-tail, where the royal prerogative is not concerned.

LASTLY, by a statute of the succeeding year (s), all estatesil are rendered liable to be charged for payment of debts due the king by record or special contract; as, fince, by the ankrupt laws (t), they are also subjected to be fold for the bits contracted by a bankrupt. And, by the construction n on the statute 43 Eliz. c. 4. an appointment (u) by teat in tail of the lands entailed, to a charitable use, is good ithout fine or recovery.

ESTATES-TAIL, being thus by degrees unfettered, are now duced again to almost the same state, even before issue born, conditional fees were in at common law, after the condin was performed, by the birth of iffue. For, first, the tent in tail is now enabled to aliene his lands and tenements fine, by recovery, or by certain other means; and thereby defeat the interest as well of his own iffue, though unborn, also of the reversioner, except in the case of the crown: condly, he is now liable to forfeit them for high treason: d, lastly, he may charge them with reasonable leases, and lowith fuch of his debts as are due to the crown on specials, or have been contracted with his fellow-subjects in a urse of extensive commerce.

(r) Co. Litt. 372. (s) 33 Hen. VIII. c. 39. § 74. at. 21 Jac. I. c. 19. (u) 2 Vern. 453. Chan. Prec. 16.

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CHAPTER THE EIGHTH.

OF FREEHOLDS, NOT OF INHERITANCE.

W E are next to discourse of such estates of freehold, a are not of inheritance, but for life only. And, of the estates for life, some are conventional, or expressly created the act of the parties; others merely legal, or created construction and operation of law (a). We will conside them both in their order.

I. Estates for life, expressly created by deed or grant (which alone are properly conventional) are where a least made of lands or tenements to a man, to hold for the terms his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant to life; only, when he holds the estate by the life of another, his usually called tenant pur auter vie (b). These estates is life, are, like inheritances, of a feodal nature; and were, he some time, the highest estate that any man could have in send, which (as we have before seen, (c) was not in its original hereditary. They are given or conferred by the same seed rites and solemnities, the same investiture or livery of sein as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the low or lessor and his tenant or lessee, have agreed on.

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(3) Wright 190. (b) Litt. §. 56. (c) pag. 55.

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ESTATES for life may be created, not only by the express ords before-mentioned, but also by a general grant, without stning or limiting any specific estate. As, if one grants to B. the manor of Dale, this makes him tenant for life (d). For though, as there are no words of inheritance, or beirs, entioned in the grant, it cannot be construed to be a fee, shall however be construed to be as large an estate as the ords of the donation will bear, and therefore an estate for e. Also such a grant at large, or a grant for term of life nerally, shall be construed to be an estate for the life of a grantee (e); in case the grantor hath authority to make the a grant: for an estate for a man's own life is more besicial and of a higher nature than for any other life; and crule of law is, that all grants are to be taken most strongly ainst the grantor (f), unless in the case of the king.

Such estates for life will, generally speaking, endure as g as the life for which they are granted: but there are ne estates for life, which may determine upon future tingencies, before the life, for which they are created, ires. As, if an estate be granted to a woman during her owhood, or to a man until he be promoted to a benefice; these and similar cases, whenever the contingency hap-. s, when the widow marries, or when the grantee obtains a efice, the respective estates are absolutely determined and e(g). Yet, while they fubfift, they are reckoned effates life; because, the time for which they will endure being ertain, they may by possibility last for life, if the contincies upon which they are to determine do not sooner hap-And, moreover, in case an estate be granted to a man is life, generally, it may also determine by his civil death; f he entered into a monastery, whereby he is dead in h): for which reason in conveyances the grant is usually e " for the term of a man's natural life;" which can determine by his natural death(i).

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(e) Ibid. (f) Ibid 36. (g) Co. 41. 3 Rep. 20. (h) 2 Rep. 48. (i) See Vol. I. pag. 132.

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THE incidents to an estate for life, are principally the following; which are applicable not only to that species of te. nants for life, which are expressly created by deed; but allo to those, which are created by act and operation of law.

- r. EVERY tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demiled to him reasonable estovers (k) or botes (1). For he hatha right to the full enjoyment and use of the lands and all is profits, during his estate therein. But he is not permitted to cut down timber or do other waste upon the premisses (m) for the destruction of such things, as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanen and lasting loss of the person entitled to the inheritance.
- 2. TENANT for life, or his representatives, shall not h prejudiced by any fudden determination of his estate, becau fuch determination is contingent and uncertain (n). Then fore if a tenant for his own life fows the lands, and dies be fore harvest, his executors shall have the emblements, or pro hits of the crop: for the estate was determined by the ad God; and it is a maxim in the law, that actus Dei nemini for injuriam. The representatives therefore of the tenant s life shall have the emblements, to compensate for the labor and expense of tilling, manuring, and sowing, the lands; a also for the encouragement of husbandry, which being public benefit, tending to the increase and plenty of provi ons, ought to have the utmost security and privilege that law can give it. Wherefore, by the feodal law, if a tena for life died between the beginning of September and the of February, the lord, who was entitled to the reversion, w also entitled to the profits of the whole year; but if he d between the beginning of March and the end of August, io mic v oni toi " he

⁽k) See pag. 35.

⁽¹⁾ Co. Litt. 41.

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heirs of the tenant received the whole (o). From hence our law of emblements feems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and cestury que vie, or he on whose life the land is held, dies after the corn sown, the tenant pur auter vie shall have the emblements. The same is also the rule, if a life-estate be determined by the act of law. Therefore, if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life) and the husband fows the land, and afterwards they are diforced a vinculo matrimonii, the husband shall have the emelements in this case; for the sentence of divorce is the act flaw (p). But if an estate for life be determined by the tenant's own act, (as, by forfeiture for waste committed; or, if atenant during widowhood thinks proper to marry) in thefe, nd fimilar cases, the tenants, having thus determined the thate by their own acts, shall not be entitled to take the mblements (q). The doctrine of emblements extends not only to corn fown, but to roots planted, or other annual arificial profit: but it is otherwise of fruit-trees, grafs, and he like; which are planted annually at the expense and lafour of the tenant, but are either the permanent, or natural rofit of the earth (r). For even when a man plants a tree, e cannot be prefumed to plant it in contemplation of any refent profit; but merely with a prospect of its being useful ofuture fuccessions of tenants. The advantages also of emdements are particularly extended to the parochial clergy by he fratute 28 Henry VIII. c. 17. For all persons who are resented to any ecclefiastical benefice, or to any civil office, re considered as tenants for their own lives, unless the conrary be expressed in the form of donation.

3. A THIRD incident to estates for life relates to the under enants or lesses. For they have the same, nay greater in-lugences, than their lessors, the original tenants for life. The law; for the law of estovers and emblements, with regard

⁽a) Feud. I. 2. t. 28. (b) 5 Rep. 116. (q) Co. Litt. 55. (t) Co. Litt. 55, 56. 1 Roll. Abr. 728.

BOOK II.

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gard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place (s): and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee who is a thin person. As in the case of a woman who holds druante vidni tate; her taking husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who fows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger and could not prevent her (t). The lesses tenants for life had also at the common law another most unreasonable advantage; for, at the death of their lessors thetenants for life, these under-tenants might if they pleased qui the premises, and pay no rent to any body for the occupation of the land fince the last quarter day, or other day affigned for payment of rent (u). To remedy which it is now enacted (v), that the executors or administrators of tenant for life on whose death any lease determined, shall recover of the lefsee a ratable proportion of rent, from the last day of paymen to the death of fuch leffor.

II. The next estate for life is of the legal kind, as contradistinguished from conventional; viz. that of tenant in tar after possibility of issue extinct. This happens, where one tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or, having lest issue that issue becomes extinct; in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As, where one has an estate to him and his heirs on the body of his present wife to be begotten and the wife dies without issue (w): in this case the manha an estate-tail, which cannot possibly descend to any one; an therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For

⁽s) Co. Litt. 55. (i) Cro. Eliz. 461. 1 Roll. Abr. 727 (u) 10 Rep. 127. (v) Stat. 11 Geo. II. e. 19. §. 15. (s) Litt. §. 32.

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had called him barely tenant in fee-tail special, that would other distinguished him from others; and besides he has no inger an estate of inheritance, or see (x), for he can have no eirs, capable of taking per formam doni. Had it called in tenant in tail without iffue, this had only related to the estent fact, and would not have excluded the possibility of sure iffue. Had he been styled tenant in tail without possibility of sur, this would exclude time past as well as present, and he ight under this description never have had any possibility of sue. No definition therefore could so exactly mark him it, as this of tenant in tail after possibility of issue extinct, hich (with a precision peculiar to our own law) not only takes in epossibility of issue in tail which he once had) but also states at this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, the death of that person, out of whose body the issue was to ring; for no limitation, conveyance, or other human act in make it. For, if land be given to a man and his wife, if the heirs of their two bodies begotten, and they are direct a vinculo matrimonii, they shall neither of them have is estate, but be barely tenants for life, notwithstanding the heritance once vested in them (y). A possibility of issue is ways supposed to exist, in law, unless extinguished by the ath of the parties; even though the donees be each of them hundred years old (z).

This estate is of an amphibious nature, partaking partly an estate-tail, and partly of an estate for life. The tenant in truth, only tenant for life, but with many of the priviges of a tenant intail; as, not to be punishable for waste, c. (a): or, he is tenant in tail, with many of the restrictions a tenant for life; as, to forfeit his estate if he alienes it in e-simple (b): whereas such alienation by tenant in tail, ough voidable by the issue, is no forfeiture of the estate to ereversioner: who is not concerned in interest, till all possibility of issue be extinct. But, in general, the law books upon

⁽x) 1 Roll. Rep. 184. 11 Rep. 80. (y) Co. Litt. 28. (z) Litt. 24. Co. Litt. 28. (a) Co. Litt. 27. (b) Ibid. 28.

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upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

III. TENANT by the curtefy of England, is where a mar marries a woman seised of lands and tenements in fee-simple of fee-tail; that is, of an estate of inheritance; and has by he issue, born alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtefy of England (c).

THIS estate, according to Littleton, has its denomination, because it is used within the realm of England only; and it is faid in the mirrour (d) to have been introduced by king Henry the first : but it appears also to have been the establish ed law of Scotland, wherein it was called curialitas (e): f that probably our word curtefy was understood to fignify a ther an attendance upon the lord's court or curtis, (that is, be ing his vafal or tenant) than to denote any peculiar favour he longing to this island. And therefore it is laid down (f) that by having iffue, the husband shall be entitled to do homages the lord, for the wife's lands, alone: whereas, before if had, they must both have done it together. It is likewi used in Ireland, by virtue of an ordinance of king Henry III (g) It also appears (h) to have obtained in Normandy; and wa likewife used among the antient Almains or Germans (1) And yet it is not generally apprehended to have been a confe quence of a feodal tenure (k), though I think some substantia feodal reasons may be given for its introduction. For, if woman feised of lands hath iffue by her husband, and dies, the husband is the natural guardian of the child, and as fuch is reason entitled to the profits of the lands in order to mainta it: and therefore the heir apparent of a tenant by the curte

De Captate 28. (a) Captal and all from the

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able by the if no forfeith cof the eft to to

⁽c) Litt. § 35. 52. (d) c-1. §. 3. (e) Crag. l. 2. 1. 19.
4. (f) Litt. §. 90. Co. Litt. 30. 67. 1(g) Pat. 14. H. III.
30. in 2 Bac. Abr. 659. (h) Grand Confirm c. 119. (i) Lidenbrog LL. Alman. 1, 92. (k) Wright, 294.

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19. 11. ould not be in ward to the lord of the fee, during the life of ach tenant (1). As foon therefore as any child was born, the ather began to have a permanent interest in the lands, he beame one of the pares curtis, and was called tenant by the artesy initiate; and this estate being once vested in him by he birth of the child, was not liable to be determined by the absequent death or coming of age of the infant.

THERE are four requisites necessary to make a tenancy by the urtefy; marriage, feifin of the wife, issue, and death of the ife(m). 1. The marriage must be canonical, and legal. 2. The in of the wife must be an actual seisin or possession of the ands; not a bare right to possess, which is a seisin in law, but n actual possession, which is a seisin in deed. And therefore man shall not be tenant by curtefy of a remainder or reveron. But of some incorporeal hereditaments a man may be mant by the curtefy, though there have been no actual fein of the wife: as in case of an advowson, where the church as not become void in the lifetime of the wife; which a man may hold by the curtefy, because it is impossible to have had chual seisin of it, and impotentia excusat legem (n). If the wife e an ideot, the husband shall not be tenant by the curtefy fher lands; for the king by prerogative is entitled to them, he instant she herself has any title: and since she could never erightfully seised of these lands, and the husband's title deends entirely upon her seisin, the husband can have no title s tenant by the curtefy (o). 3. The issue must be born live. Some have had a notion that it must be heard to cry; out that is a mistake. Crying indeed is the strongest evidence fits being born alive; but it is not the only evidence (p). The iffue also must be born during the life of the mother; or, if the mother dies in labour, and the Cæsarean operation sperformed, the husband in this case shall not be tenant by

⁽l) F. N. B. 143 (m) Co. Litt. 30. (n) *lbid*. 29. (o) Co. Litt. 30. Plowd. 263. (p) Dyer. 25. 8 Rep. 34.

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the curtefy: because, at the instant of the mother's death he was clearly not entitled, as having had no iffue born, but the land descended to the child, while he was yet in his mo. ther's womb; and the estate, being once so vested, sal not afterwards be taken from him (q). In gavelkind lands, husband may be tenant by the curtefy without having any fue (r). But in general there must be iffue born; and sud iffue must also be capable of inheriting the mother's estate (s). Therefore if a woman be tenant in tail male, and hath only a daughter born, the husband is not thereby entitled to be to nant by the curtefy; because such issue female can never in herit the estate in tail male (t). And this seems to be the me reason, why the husband cannot be tenant by the curtefy of any lands of which the wife was not actually feifed : because, in order to entitle himself to such estate, he must have begot ten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land whereof the ancestor was not actually seized; and therefore as the husband hath never begotten any issue that can be her to those iands, he shall not be tenant of them by the curtely (u). And hence we may observe, with how much nicety and confideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the iffue was born is immaterial, provided it were during the coverture: for, whether it was born before or after the wife's fesin of the lands, whether it be living or deada the time of the feifin, or at the time of the wife's decease, the husband shall be tenant by the curtefy (w). The husband by the birth of the child becomes (as we before observed) tenant by the curtefy initiate (x), and may do many acts to charge the lands; but his estate is not consummate till the death of the wife; which is the fourth and last requifite to make a complete tenant by the curtefy (y).

IV. TENANT

⁽q) Co. Litt. 29. (r) Ibid. 30. (s) Litt. §. 56. (t) Co. Litt. 29. (u) Ibid. 40. (w) Ibid. 29. (x) Ibid. 30. (y) Ibid.

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IV. TENANT in dower is where the husband of a woman seised of an estate of inheritance, and dies; in this case, wife shall have the third part of all the lands and tenents whereof he was seised during the coverture, to hold to reelf for the term of her natural life (z).

Dower is called in Latin by the foreign jurists doarium, thy Bracton and our English writers dos: which among Romans fignified the marriage portion, which the wife ought to her husband; but with us is applied to fignify this nd of estate, to which the civil law, in its original state, had thing that bore a resemblance: nor indeed is there any ing in general more different, than the regulation of landed operty according to the English, and Roman laws. Dower tof lands feems also to have been unknown in the early part our Saxon constitution; for, in the laws of king Edmond (a), wife is directed to be supported wholly out of the personal ate. Afterwards, as may be feen in gavelkind tenure, the dow became entitled to a conditional estate in one half of the ids, with a proviso that she remained chaste and unmarried ; as is usual also in copyhold dowers, or free bench. Yet me (c) have ascribed the introduction of dower to the Norms, as a branch of their local tenures; though we cannot pect any feodal reason for its invention, since it was not a tof the pure, primitive, fimple law of feuds, but was first all introduced into that fystem (wherein it was called triens, tia (d), and dotalitium) by the emperor Frederick the sead (e); who was cotemporary with our king Henry III. It possible therefore that it might be with us the relic of a mish custom: since, according to the historians of that untry, dower was introduced into Denmark by Swein, the her of our Canute the great, out of gratitude to the Dahladies, who fold all their jewels to ranfom him when taken prisoner

⁽²⁾ Litt. §. 36. (2) Wilk. 75. (b) Somner. Gavelk. 51. Litt. 33. Bro. Dower. 70. (c) Wright. 192. (d) Crag. 1. 22. §. 9. (e) Ibid.

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prisoner by the Vandals (f). However this be, the reason, which our law gives for adopting it, is a very plain and a sense ble one; for the sustenance of the wise, and the nurture and education of the younger children (g).

In treating of this estate, let us, first, consider, who may be endowed; secondly, of what she may be endowed; thirdly, the manner how she shall be endowed; and fourthly, how dower may be barred or prevented.

1. WHO may be endowed. She must be the actual wife the party at the time of his decease. If she be divorced a visculo matrimonii, she shall not be endowed; for ubi nulla matrimonium, ibi nulla dos (h). But a divorce a mensa et then only doth not destroy the dower (i); no, not even for add tery itself, by the common law (k). Yet now by the status Westm. 2. (1) if a woman clopes from her husband, and live with an adulterer, she shall lose her dower, unless her hall band be voluntarily reconciled to her. It was formerly held that the wife of an ideot might be endowed, though the hal band of an ideot could not be tenant by the curtefy (m): bu as it feems to be at present agreed, upon principles of sound fense and reason, that an ideot cannot marry, being incapa ble of consenting to any contract, this doctrine cannot not take place. By the antient law the wife of a person attaints of treason or felony could not be endowed; to the intent fays Staunforde (n), that, if the love of a man's own life cannot restrain him from such atrocious acts, the love of hi wife and children may: though Britton (o) gives it another turn; viz. that it is prefumed the wife was privy to herhol band's crime. However, the statute 1 Edw. VI. c. 12. abata the rigor of the common law in this particular, and allowe

⁽f) Mod. Un. Hist, xxxii. 9t. (g) Bract. l. 2. c. 39. a Litt. 30. (h) Bract. l 2. c. 39. a . (i) Co. Litt. 31 (k) Yet, among the antient Goths, an adulteress was punished the loss of her dotalitie et trientis ex bonis mobilibus viri. (Stiend 1. 3. c. 2.) (l) 13 Edw. l. c. 34. (m) Co. Litt. 31. (n)? C. b. 3. c. 3. (o) c. 110.

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wife her dower. But a subsequent statute (p) revived this nity against the widows of traitors, who are now barred heir dower, but not the widows of felons. An alien also not be endowed, unless she be queen consort; for no alien apable of holding lands (q). The wife must be above nine rs old at her husband's death, otherwise she shall not be owed (r): though in Bracton's time the age was indefined and dower was then only due, " si uxor possiti dotem fromereri, et virum sustance (s)."

. WE are next to enquire, of what a wife may be endow-And the is now by law entitled to be endowed of all lands tenements, of which her husband was seised in fee-simple fee-tail at any time during the coverture; and of which iffue, which she might have had, might by possibility e been heir (t). Therefore, if a man, seised in fee-simhath a fon by his first wife, and after marries a second e, he shall be endowed of his lands; for her issue might possibility have been heir, on the death of the fon by the mer wife. But, if there be a donee in special tail, who ds lands to him and the heirs of his body begotten on Jane wife; though Jane may be endowed of these lands, yet if e dies, and he marries a second wife, that second wife Il never be endowed of the lands entailed; for no iffue the could have, could by any possibility inherit them (u). feisin in law of the husband will be as effectual a sesin in d, in order to render the wife dowable; for it is not in the e's power to bring the husband's title to an actual seisin, it is in the husband's power to do with regard to the wife's ds: which is one reason why he shall not be tenant by the tely, but of such lands whereof the wife, or he himself in right, was actually seised in deed (w). The seisin of the hand, for a transitory instant only, when the same act which

p) 5 & 6 Edw. VI. c. 11. (q) Co. Litt. 31. (r) Litt. §. (s) 1, 2, c. 9. §. 3. (t) Litt. §. 36. 53. (u) Ibid. §. 53.) Co. Litt. 31

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gives him the estate conveys it also out of him again, where by a fine land is granted to a man, and he imme ately renders it back by the same fine) such a feifin will entitle the wife to a dower (x): for the land was merely transitu, and never rested in the husband. But, if the abides in him for a fingle moment, it feems that the wife h be endowed thereof (y). And, in short, a widow may be dowed of all her husband's lands, tenements, and heredi ments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contra Thus, a woman shall not be endowed of a castle, built ford fence of the realm (z): nor of a common without fint; for as the heir would then have one portion of this common, the widow another, and both without stint, the common wo be doubly stocked (a). Copyhold estates also are not liable dower, being only estates at the lord's will; unless by special custom of the manor, in which case it is usually call the widow's free-bench (b). But, where dower is allowable it matters not, though the husband aliene the lands during coverture; for he alienes them liable to dower (c).

3. NEXT, as to the manner in which a woman is to be dowed. There are now subsisting four species of dower; the fifth, mentioned by Littleton (d), de la blus belle, have been abolished together with the military tenures, of which it was a consequence. 1. Dower by the common law; that which is before described. 2. Dower by particular at tom (e); as that the wife shall have half the husband's land or in some places the whole, and in some only a quarter. Dower ad offium ecclesiae (f): which is where tenant in the source of the same of the same

(x) Cro, Jac. 615. 2. Rep. 67. Co. Litt. 31.

(y) This doctrine was extended very far by a jury in Wales, when the father and son were both hanged in one cart, but the son use supposed to have survived the father, by appearing to strugg longest; whereby he became seised of an estate by survivorship in consequence of which teisin his widow had a verdict for how dower. (Cro. Eliz. 503).

(z) Co. Litt. 31. 3 Lev. 40

(a) Co. Litt. 32. 1 Jon. 315.

(b) 4 Rep. 22.

(c) Co. Litt. 32.

(d) §. 48, 49.

(e) Litt. §. 37.

(f) Ibid. §. 39.

swere formerly celebrated, after affiance made and (Sirrard Coke in his translation adds) troth plighted between a doth endow his wife with the whole, or such quantity e shall please, of his lands; at the same time specifying ascertaining the same: on which the wife, after her hustis death, may enter without farther ceremony. 4. Dower same patris (g); which is only a species of dower ad mecclesiae, made when the husband's father is alive, and son by his consent, expressly given, endows his wife with elos his father's lands. In either of these cases, they must prevent frauds) be made (h) in facie ecclesiae et ad offium sae; non enim valent sasta in lecto mortali nec in camera, alibi ubi clandestina suere conjugia.

is curious to observe the several revolutions which the ine of dower has undergone, fince its introduction into and. It feems first to have been of the nature of the rin gavelkind, before-mentioned; viz. a moiety of the and's lands, but forfeitable by incontinency or a fecond tage. By the famous charter of Henry I. this condition, idowhood and chastity was only required in case the and left any iffue (i): and afterwards we hear no more of Under Henry the fecond, according to Glanvil (k), the r ad offium ecclefiae was the most usual species of dowand here, as well as in Normandy (1), it was binding the wife, if by her confented to at the time of marriage. her, in those days of feodal rigor, was the husband ald to endow her ad offium ecclefiae with more than the part of the lands whereof he was then feifed, though he tendow her with less; lest by such liberal endowments ordmight be defrauded of his wardships and other feodal ts (m). But if no specific donation was made at the church

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Litt. §. 40. (h) Bracton, l. 2. c. 39. §. 4. (i) Si o viro uxor ejus remanserit, et sine liberis fuerit, dotem habebit;—si vero uxor cum liberis remanserit, dotem quidem hit, dum corpus suum legitime servaverit. (Cart. Hen. I. A. D. Introd. to great charter, edit. Oxon. pag. iv.) (k) l. 6. &. 2. (l) Gr. Coussum. c. 101. (m) Bract. l, 2. c. 39.

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church porch, then she was endowed by the common law the third part (which was called her dos rationabilis) of h lands and tenements, as the husband was feised of at their of the espousals, and no other; unless he specially engage before the priest to endow her of his future acquisitions and, if the husband had no lands, an endowmenting chattels, or money, at the time of espousals, was a bar of dower (o) in lands which he afterwards acquired (p). In Iohn's magna carta, and the first charter of Henry III (4) mention is made of any alteration of the common law, in spect of the lands subject to dower: but in those of 1217,1 1224, it is particularly provided, that a widow shall be tled for her dower to the third part of all fuch lands as the band had held in his life time (r): yet, in case of a special endowment of less ad offium ecclesiae, the widow had fill power to wave it after her husband's death. And this co nued to be law, during the reigns of Henry III. and Edw I (s). In Henry IV's time it was denied to be law, the

(n) De questu suo (Glanv. ibid.) de terris acquisitis et acquire (Bract. ibid.) (o) Glan. c. 2. (p) When special endown were made ad oftium ecclesiae, the husband, after affiance m and troth plighted, used to declare with what specific land meant to endow his wife, (quod dotat eam de tali maneri pertinentiis, &c. Bract. ibid.) and therefore in the old You tual (Seld. Ux. Hebr. 1. 2. c. 27.) there is, at this part of the trimonial service, the following rubric; " facerdos interrigi " tem mulieris; et, si terra ei in dotem detur, tunc dicatur, unu iste, &c." When the wife was endowed generally (thi uxorem suam dotaverit in generali, de omnibus terris et tenena Braci. ibid.) the husband seems to have said, " with all my " and tenements I thee endow;" and then they all became to her dower. When he endowed her with personalty only used to say, " with all my worldly goods (or, as the Salibur, tual has it, with all my wordly chattel) I thee endo which entitled the wife to her thirds, or pars rationabilis, personal estate, which is provided for by magna carta, cot and will be farther tre ted of in the concluding chapter of book: though the retaining this last expression in our moder turgy, if any meaning at all, can now refer only to the rig maintenance, which she acquires during coverture, out of her (q) A. D. 1216. c. 7. edit. band's personalty. (r) Assignetur autem ei pro dote sua tertia pars totius ternats Jui quae sua fuit in vita sua, nifi de minori dotata fueritado () Bract. ubi fupr. Britton. 6. ecclesiae. c. 7. (Ibid.) 102. Flet. 1. 5. c. 23. §. 11, 12.

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man can be endowed of her husband's goods and chats(t): and, under Edward IV. Littleton lays it down exffly, that a woman may be endowed ad offium ecclefiae
h more than a third part (u); and shall have her election,
er her husband's death, to accept such dower, or refuse it
betake herself to her dower at common law (w). Which
e of uncertainty was probably the reason, that these spec dowers, ad offium ecclesiae and ex assense patris, have
e fallen into total disuse.

PROCEED therefore to confider the method of endownt, or affigning dower, by the common law, which is now only usual species. By the old law, grounded on the feoexactions, a woman could not be endowed without a fine to the lord: neither could she marry again without his nce: lest she should contract herself, and so convey part he feud, to the lord's enemy(x). This licence the lords care to be well paid for; and, as it feems, would fomeesforce the dowager to a second marriage, in order to gain fine. But, to remedy these oppressions, it was provided, by the charter of Henry I (y), and afterwards by magna a (2), that the widow shall pay nothing for her marriage, shall be distreined to marry afresh, if she chooses to live tout a husband; but shall not however marry against the ent of the lord: and farther, that nothing shall be taken affignment of the widow's dower, but that she shall remain erhusband's capital mansion-house for forty days after his h, during which time her dower shall be affigned. These y days are called the widow's quarentine; a term made use law to fignify the number of forty days, whether apto this occasion, or any other (a). The particular lands, e held in dower, must be affigned (b) by the heir of the and, or his guardian; not only for the fake of notoriety, also to entitle the lord of the fee to demand his services of heir, in respect of the lands so holden. For the heir by

⁽¹⁾ P. 7. Hen. IV. 13, 14.

§ 39 F. N. B. 150. (w) § 41. (x) Mirr. c. 1. § 3.

bi supra. (2) cap. 7. (2) It signifies, in particular, the
days, which persons coming from infected countries are
ed to wait, before they are permitted to land in England.
Co. Litt. 34, 35.

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this entry becomes tenant thereof to the lord, and the wild is immediate tenant to the heir, by a kind of subinfeudate or under-tenancy, completed by this investiture or affigument which tenure may still be created, notwithstanding thestan of quia emptores, because the heir parts not with the fee-in ple, but only with an estate for life. If the heir or his gu dian do not affign her dower within the term of quarentin or do affign it unfairly, fhe has her remedy at law, and fheriff is appointed to affign it (c). Or if the heir (being der age) or his guardian, affign more than fhe ought to ha it may be afterwards remedied by writ of admeasurement dower (d). If the thing of which she is endowed be divible her dower must be set out by metes and bounds; but if it indivisible, she must be endowed specially; as, if the this presentation to a church, the third toll-dish of a mill, the part of the profits of an office, the third sheaf of tithe, the like (e).

UPON preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: so the claim of the wife to her dower at the common law disting itself so extensively, it became a great clog to alienation and was otherwise inconvenient to families. Wherefore since the alteration of the antient law respecting dower all tium ecclesiae, which hath occasioned the intire distuse of the species of dower, jointures have been introduced in the stead, as a bar to the claim at common law. Which has me to enquire, lastly,

4. How dower may be barred or prevented. A wide may be barred of her dower not only by elopement, diver being an alien, the treason of her husband, and other disalities before-mentioned, but also by detaining the title dear or evidences of the estate from the heir; until she resto them (f); and, by the statute of Glocester (g), if a down

⁽c) Co. Litt. 34, 35. (d) F. N. B. 148. Finch. L. 314. S Westm. 2. 13 Edw. I. c. 7. (e) Co. Litt. 32. (f) lbid.: (g) 6 Edw. I. c. 7.

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ienes the land affigned her for dower, she forfeits it ipso to, and the heir may recover it by action. A woman also ay be barred of her dower, by levying a fine or suffering a covery of the lands, during her coverture (h). But the oft usual method of barring dowers is by jointure, as reguted by the statute 27 Hen. VIII. c. 10.

A JOINTURE, which strictly speaking signifies a joint ate, limited to both husband and wife, but in common ceptation extends also to a sole estate, limited to the wife ly, is thus defined by fir Edward Coke (i); " a competent livelyhood of freedom for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least." his description is framed from the purview of the statute 27 m. VIII. c. 10. before-mentioned; commonly called the tute of uses, of which we shall speak fully hereafter. At esent I have only to observe, that, before the making of it statute, the greatest part of the land of England was conyed to uses; the property or possession of the soil being ted in one man, and the use, or profits thereof, in anter; whose directions, with regard to the disposition therethe former was in conscience obliged to follow, and might compelled by a court of equity to observe. Now, though susband had the use of lands in absolute fee-simple, yet the fe was not entitled to any dower therein; he not being ed thereof: wherefore it became usual, on marriage, to tle by express deed some special estate to the use of the husad and his wife, for their lives, in joint-tenancy or joine; which settlement would be a provision for the wife in e the furvived her husband. At length the statute of uses lained, that fuch as had the use of lands, should, to all inits and purposes, be reputed and taken to be absolutely ed and possessed of the soil itself. In consequence of which al seisin, all wives would have become dowable of such ds as were held to the use of their husbands, and also enedat the same time to any special lands that might be settled VOL. II. G

⁽h) Pig. of recov. 66.

^{(1) 1} Inft. 36.

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in jointure; had not the same statute provided, that up making fuch an estate in jointure to the wife before married the shall be for ever precluded from her dower (k). Butth these four requisites must be punctually observed. 1. Their ture must take effect immediately on the death of the husban 2. It must be for her own life at least, and not pur auter or for any term of years, or other smaller estate. 3. Itm be made to herself, and no other in trust for her. 4. Itm be made, and fo in the deed particularly expressed to be fatisfaction of her whole dower, and not of any particular of it. If the jointure be made to her after marriage, the her election after her husband's death, as in dower adoft ecclefiae, and may either accept it, or refuse it and betakeh felf to her dower at common law; for she was not capa of consenting to it during coverture. And if, by any fin or accident, a jointure made before marriage proves tobe a bad title, and the jointress is evicted, or turned out of fession, she shall then (by the provisions of the same state have her dower pro tanto at the common law (1).

THERE are some advantages attending tenants in do that do not extend to jointresses; and so, vice versa, in tresses are in some respects more privileged than tenants dower. Tenant in dower by the old common law is sub

⁽k) 4 Rep. 1, 2. (1) These settlements, previous ton riage, seem to have been in use among the antient Germans, their kindred nation the Gavis. Of the former Tacitus gint this account. "Dotem non uxor marito, sed uxori maritus of intersunt parentes et propinqui, et munera probant." (de Germ. c. 18.) And Cæsar, (de bello Gallico, 1. 6. c. 18.) has sus the terms of a marriages ettlement among the Gauls, asso calculated as any modern jointure. "Viri, quantas pecunial "uxoribus dotis nomine acceperunt, tantas ex suis bonis, assistant one facta, cum dotibus communicant. Hujus omnis pecunial "junctim ratio babetur, fructusque servantur. Uter corunt superarit, ad eum pars utriusque servantur. Uter corunt porum pervenit." The dauphin's commentator on Cæsarsup that the Gaulish custom was the ground of the new regular made by Justinian (Nov. 97.) with regard to the provision for dows among the Romans: but surely there is as much result suppose, that it gave the hint for our statuable jointures.

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to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot diffrein for his debt; if contracted during the coverture (m). But, on the other hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower ad offium ccclesiae, which a jointure in many points refembles; and the refemblance was fill greater, while that species of dower continued in its primitive state: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal affignment of dower (n). And, what is more, though dower be forfeited by the treason of the husband, yet lands fettled in jointure remain unimpeached to the widow (o). Wherefore fir Edward Coke very justly gives it the preference, as being more fafe and fure to the widow, than even dower ad offium ecclesiae, the most eligible species of any.

> (m) Co. Litt. 31. a. F. N. B. 150. (n) Co. Litt. 36. (o) Ibid. 73.

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CHAPTER THE NINTH.

OF ESTATES, LESS THAN FREEHOLD.

Of estates, that are less than freehold, there are three forts; 1. Estates for years: 2. Estates at will: 3. Estates by sufferance.

I. An estate for years is a contract for the possession of lands or tenements, for some determinate period: and it happens where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lesses (a), and the lesses enters thereon (b). If the lease be but for half a year, or a quarter, or any less time, this lesses is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of (c). And this may, not improperly, lead us into a short explanation of the division and calculation of time by the English law.

THE space of a year is a determinate and well-known period, consisting commonly of 365 days: for, though in billextile of leap-years

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leap-years it confifts properly of 368, yet by the statute 21 Hen. III. the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a mon this more ambiguous : there being, in common use, two months ways of calculating months; either as lunar, confifting of wenty-eight days, the supposed revolution of the moon, thirtenof which make a year; or, as calendar months, of unequal engths, according to the Julian division in our common almahacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, rtwenty-eight days, unless otherwise expressed; not only beause it is always one uniform period, but because it falls natually into a quarterly division by weeks. Therefore a lease for 'twelve months" is only forforty-eight weeks; but if it be or "a twelvemonth" in the fingular number, it is good for he whole year (d). For herein the law recedes from its usual alculation, because the ambiguity between the two methods fcomputation ceases; it being generally understood, that by bespace of time called thus, in the singular number, a twelvenonth, is meant the whole year, confisting of one solar revoution. In the space of a day all the twenty-four hours are fually reckoned; the law generally rejecting all fractions of a ay, in order to avoid disputes (e). Therefore, if I am bound paymoney on any certain day, I discharge the obligation if pay it before twelve o'clock at night; after which the folwing day commences. But to return to estates for years.

THESE estates were originally granted to mere farmers or usbandmen, who every year rendered some equivalent in moty, provisions, or other rent, to the lessors or landlords; but, order to encourage them to manure and cultivate the ground, by had a permanent interest granted them, not determinable the will of the lord. And yet their possession was esteemed so little consequence, that they were rather considered as the siliss or servants of the lord, who were to receive and account

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⁽d) 6 Rep. 61.

⁽e) Co. Litt, 135.

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for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the antient law, be at any time defeated, by a common recovery suffered by the tenant of the freehold (f); which annihilated all leases for years then substituting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

WHILE estates for years were thus precarious, it is no wonder that they were usually very short, like our moden leases upon rack-rent; and indeed we are told (g) that by the antient law, no leafes for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the duration of the estate might tend to defeat the inheritance. Yet this law, if ever it existed, was soon antiquated: for we may observe, in Madox's collection of antient instruments, some leases for years of a pretty early date, which confiderably exceed that period (h); and long terms, for three hundread years a least, were certainly in use in the time of Edward III () and probably of Edward I. (k). But certainly, when by the statute 21 Hen. VIII. c. 15. the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than be fore; and were afterwards extensively introduced, being found extremely convenient for family fettlements and mont gages: continuing subject, however, to the same rules fuccession

⁽f) Co. Litt. 46.. (g) Mirror. c. 2. §. 27. Co. Litt. 45. f (h) Madox. Formulare Anglican. No. 239 fol. 140. Demile in ei. hty years, 21 Ric. II. . . . Ibid. No. 245. fol. 146. for the like term, A. D. 1429. . . . Ibid, No. 248. fol. 148. for fifty years, E. w. IV. (i) 22 Aff. pl. 6. (k) Stat. of mortman, E. w. I.

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ccession, and with the same inferiority to freeholds, as nen they were little better than tenancies at the will of landlord.

EVERY estate which must expire at a period certain and fixed, by whatever words created, is an estate for years. nd therefore this estate is frequently called a term, termi-, because its duration or continuance is bounded, limited, d determined: for every fuch estate must have a certain ginning, and certain end (1). But id certum eft, quod cern reddi potest; therefore if a man make a lease to another, fo many years as J. S. shall name, it is a good lease for ars (m); for though it is at present uncertain, yet when S. hath named the years, it is then reduced to a certainty. no day of commencement is named in the creation of this ate, it begins from the making, or delivery, of the leafe . A lease for so many years as J. S. shall live, is void m the beginning (o); for it is neither certain, nor can er be reduced to a certainty, during the continuance of elease. And the same doctrine holds, if a parson make ease of his glebe for so many years as he shall continue fon of Dale; for this is still more uncertain. But a lease twenty or more years, if J. S. shall so long live, or if shall so long continue parson, is good (p): for there is a tain period fixed, beyond which it cannot last; though may determine sooner, on the death of J. S. or his ceasg to be parson there.

We have before remarked, and endeavoured to assign the asson of, the inferiority in which the law places an estate years, when compared with an estate for life, or an infitance: observing, that an estate for life, even if it be a auter vie, is a freehold; but that an estate for a thound years is only a chattel, and reckoned part of the personal ate (q). Hence it follows, that a lease for years may be ade to commence in future, though a lease for life cannot. s, if I grant lands to Titius to hold from Michaelmas

(1) Co. Litt. 45. (m) 6 Rep. 35. n) Co. Litt. 46.

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next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void, For no estate of freehold can commence in futuro; because it cannot be created at law without livery of feifin, or corporal possession of the land: and corporal possession canno be given of an estate now, which is not to commence now, but hereafter (r). And, because no livery of seisin is necessary to a lease for years, such lessee is not faid to be feised, or to have true legal feifin, of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him: right of entry on the tenement, which right is called his in terest in the term, or interesse termini: but when he has actually fo entered, and thereby accepted the grant, the effat is then and not before vested in him, and he is possessed, no properly of the land, but of the term of years (s); the polsession or seisin of the land remaining still in him who has the freehold. Thus the word, term, does not merely fignify the time specifyed in the lease, but the estate also and interest that passes by that lease: and therefore the term may expire during the continuance of the time; as by furrender, forfelture, and the like. For which reason, if I grant a lease to A for the term of three years, and after the expiration of the faid term to B for fix years, and A furrenders or forfeits his lease at the end of one year, B's interest shall immediately take effect: but if the remainder hath been to B from and after the expiration of the faid three years, or from and after the expiration of the faid time, in this case B's interest will no commence till the time is fully elapsed, whatever may be come of A's term (t).

TENANT for term of years hath incident to, and infeparable from his estate, unless by special agreement, the same estovers, which we formerly observed (u) that tenant for life was entitled to; that is to say, house-bote, fire-bote, ploughbote, and hay-bote, (w): terms which have been already explained (x).

⁽r) 5 Rep. 94. (s) Co Litt. 46. (t) Ibid. 45. (u) pag. 122. (w) Co. Litt. 45. (x) pag. 35.

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WITH regard to emblements, or profits of land fowed by ant for years, there is this difference between him, and ant for life : that where the term of tenant for years deads upon a certainty, as if he holds from midfummer for years, and in the last year he fows a crop of corn, and it ot ripe and cut before midfummer, the end of his term, landlord shall have it; for the tenant knew the expiraof his term, and therefore it was his own folly to fow at he never could reap the profits of (y). But where the e for years depends upon an uncertainty; as, upon the th of the leffor, being himself only tenant for life, or bea husband seised in right of his wife; or if the term of s be determinable upon a life or lives; in all these cases, estate for years not being certainly to expire at a time known, but merely by the act of God, the tenant, or executors, shall have the emblements in the same manner, tatenant for life or his executors shall be entitled thereto Not so, if it determine by the act of the party himself; f tenant for years does any thing that amounts to a forure: in which case the emblements shall go to the lessor, not to the leffee, who hath determined his estate by his default (a).

I. THE second species of estates not freehold are estates will. An estate at will is where lands and tenements are by one man to another, to have and to hold at the will of lessor; and the tenant by force of this lease obtains poson (b). Such tenant hath no certain indescassible estate, sing that can be assigned by him to any other; for that the is may determine his will, and put him out whenever he sees. But every estate at will is at the will of both parties, lord and tenant; so that either of them may determine will, and quit his connexions with the other at his own fure (c). Yet this must be understood with some restriction, if the tenant at will sows his land, and the G 5 landlord

Litt. §. 68. (2) Co. Litt. 56. (a) Ibid. 55.

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landlord before the corn is ripe, or before it is reaped, put him out, yet the tenant shall have the emblements, and so ingress, egress, and regress, to cut and carry away the prosits (d). And this for the same reason, upon which all the cases of emblements turn; viz. the point of uncertainty since the tenant could not possibly know when his landlow would determine his will, and therefore could make no provision against it; and staving sown the land, which is forth good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land (e).

What act does, or does not, amount to a determinate of the will on either fide, has formerly been matter of get debate in our courts. But it is now, I think, fettled, the (befides the express determination of the leffor's will, by a claring that the leffee shall hold no longer; which must eithe be made upon the land (f), or notice must be given to the leffee (g) the exertion of any act of ownership by the lefters entering upon the premises and cutting timber (h), taken a distress for rent and impounding it thereon (i), or making feostment, or lease for years of the land to commence immediately (k); any act of desertion by the leffee, as affiguing his estate to another, or committing waste, which is an inconsistent with such a tenure (1); or, which is instar ommit the death or outlawry, of either lessor or lessee (m); puts end to or determines the estate at will.

THE law is however careful, that no fudden determinate of the will by one party shall tend to the manifest and a foreseen prejudice of the other. This appears in the cast emblements before mentioned; and, by a parity of reasons.

⁽d) Co. Litt. 56. (e) Ibid. 55. (f) Ibid. (g) 1 Vt. 248. (h) Co. Litt. 55. (i) Ibid. 57. (k) 1 Roll. 860. 2 Lev. 88. (l) Co. Litt. 55. (m) 5 Rep. 116. Litt. 57. 62.

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he lessee after the determination of the lessor's will, shall ave reasonable ingress and egress to fetch away his goods and utensils (n). And, if rent be payable quarterly or half-rearly, and the lessee determines the will, the rent shall be aid to the end of the current quarter or half-year (o). And, upon the same principle, courts of law have of late years eant as much as possible against construing demises, where to certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so ong as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party of determine the tenancy even at the end of the year, without reasonable notice to the other (p).

THERE is one species of estates at will, that deserves nore particular regard than any other; and that is, an efate held by copy of court roll; or, as we usually call it, a opyhold estate. This, as was before observed (q), was in its riginal and foundation nothing better than a mere estate at vill. But, the kindness and indulgence of successive lords f manors having permitted these estates to be enjoyed by the enants and their heirs, according to particular customs efablished in their respective districts; therefore, though they ill are held at the will of the lord, and so are in general exressed in the court rolls to be, yet that will is qualified, rerained, and limited, to be exerted according to the custom of he manor. This custom, being suffered to grow up by the ord, is looked upon as the evidence and interpreter of his will; is will is no longer arbitrary and precarious; but fixed and feertained by the custom to be the same, and no other, that as time out of mind been exercised and declared by his anestors. A copyhold tenant is therefore now full as properly tenant by the custom, as a tenant at will; the custom havng arisen from a series of uniform wills. And therefore it

⁽n) Litt. §. 69. (o) Salk. 414. I Sid. 339. (p) This ind of lease was in use as long ago as the reign of Hen. VIII. hen half a year's notice seems to have been required to determine (T. 13 Hen. VIII. 15, 16.) (q) pag. 93.

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is rightly observed by Calthorpe (r), that "copyholden "and customary tenants differ not so much in nature as in

" name: for although some be called copyholders, some cul" tomary, some tenants by the virge, some base tenants, some

" bond tenants, and some by one name and some by another,
yet do they all agree in substance and kind of tenure: all

"the faid lands are holden in one general kind, that is, by

" custom and continuance of time; and the diversity of their names doth not alter the nature of their tenure."

ALMOST every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor; which customs differ as much as the humour and temper of the respective antient lords, (whence we may account for their great variety) fuch tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereaster confider, to hold united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-fimple, in fee-tail, for life, by the curtefy, in dower, for years, a fufferance, or on condition: fubject however to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulged, by immemorial culcustom, has declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none of these interests amount to freehold; for the freehold of the whole manor abides always in the lord only (s), who hath granted out the use and occupation, but not the corporal feifin or true possession, of certain parts and parcels thereof, to these his customary to nants at will.

THE reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-simple and also tenant.

⁽r) On copyl olds. 51. 54. (s) Litt. §. 81. 2 Inft. 325.

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mant at the lord's will, feems to have arisen from the nature of illenage tenure; in which a grant of any estate of freehold, or ven for years absolutely, was an immediate enfranchisement fthevillein (t). The lords therefore, though they were willing enlarge the interest of their villeins, by granting them estates hich might endure for their lives, or sometimes be descendible their issue, yet did not care to manumit them entirely; and rthat reason it seems to have been contrived, that a power of fumption at the will of the lord should be annexed to these ants, whereby the tenants were still kept in a state of villenre, and no freehold at all was conveyed to them in their reective lands: and of course, as the freehold of all lands must ceffarily rest and abide somewhere, the law supposes it to ntinue and remain in the lord. Afterwards, when these vilinsbecame modern copyholders, and had acquired by custom fure and indefeafible estate in their lands, on performing the hal fervices, but yet continued to be styled in their admissions nants at the will of the lord, --- the law still supposed it an abrdity to allow, that fuch as were thus nominally tenants at Il could have any freehold interest: and therefore continued, dstill continues to determine, that the freehold of lands so lden abides in the lord of the manor, and not in the tenant; though he really holds to him and his heirs for ever, yet he also said to hold at another's will. But, with regard to cernother copyholders, of free or privileged tenure, which are rived from the antient tenants in villein-focage (v), and are thaid to hold at the will of the lord, but only according to the som of the manor, there is no fuch abfurdity in allowing them be capable of enjoing a freehold interest: and therefore the wdoth not suppose the freehold of such lands to rest in the dof whom they are holden, but in the tenants themselves ; who are fometimes called customary freeholders, being alwed to have a freehold interest, though not a freehold tenure.

⁽t) Mirr. c. 2 § 28. Litt. §. 204, 5, 6. (v) See page 98, (u) Fitzh. Abr. tit. coronae. 310. custom. 12. Bro. Abr. custom. 2. 17. tenant per copie. 22. 9 Rep. 76. Co. Litt 59. Copyl. §. 32 Cro. Car. 229. 1 Roll. Abr. 562. 2 Ventr. 143. 1th. 432. Lord Raym. 1225.

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However, in common cases, copyhold estates are started (for the reasons above-mentioned) among tenancies will; though custom, which is the life of the common law has established a permanent property in the copyholders, who were formerly nothing better than bondmen, equal to that the lord himself, in the tenements holden of the manor: not sometimes even superior; for we may now look upon a copy holder of inheritance, with a fine certain, to be little insent to an absolute freeholder in point of interest, and in others spects, particularly in the clearness and security of his title to be frequently in a better situation.

III. An estate at sufferance, is where one comes into polle fion of land by lawful title, but keeps it afterwards without a title at all. As if a man takes a leafe for a year, and, after year is expired, continues to hold the premises without a fresh leave from the owner of the estate. Or, if a man make a leafe at will, and dies, the estate at will is thereby determine but if the tenant continueth possession, he is tenant at suffer ance (w). But no man can be tenant at sufferance against king, to whom no laches, or neglect, in not entering and on ing the tenant, is ever imputed by law: but his tenant, holding over, is considered as an absolute intruder (x). B in the case of a subject, this estate may be destroyed when ver the true owner shall make an actual entry on the lan and oust the tenant; for, before entry, he cannot maintain an tion of trespass against the tenant by sufferance, as he mig against a stranger (y): and the reason is, because the tenant ing once in by a lawful title, the law (which prefumes wrong in any man) will suppose him to continue upon 1 tleequally lawful; unless the owner of the land by somep lic and avowed act, fuch as entry is, will declare his con nuance to be tortious, or, in common language, wrong

(w) Co. Litt. 57.

(x) Ibid.

(y) Ibid.

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THUS stands the law, with regard to tenants by sufferce; and landlords are obliged in these cases to make foral entries upon their lands (z), and recover possession by the gal process of ejectment: and at the utmost, by the common w, the tenant was bound to account for the profits of the nd so by him detained. But now, by statute 4 Geo. II. c. in case any tenant for life or years, or other person in aiming under or by collusion with fuch tenant, shall wilfully ld over after the determination of the term, and demand ade in writing for recovering the possession of the premises. him to whom the remainder or reversion thereof shall beng; fuch person, so holding over, shall pay, for the time continues, at the rate of double the yearly value of the nds so detained. This has almost put an end to the prace of tenancy by fufferance, unless with the tacit consent the owner of the tenement.

(z) 5 Mod. 384.

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CHAPTER THE TENTH.

OF ESTATES UPON CONDITION,

B ESIDES the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, whichis called an estate upon condition; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated(a). And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, afreehold, or a term of years, may depend upon these provisional restrictions. Estates then upon condition, thus understood, are of two forts: 1. Estates upon condition implied: 1. Estates upon condition expressed: under which last may be included, 3. Estates held in vadio, gage, or pledge: 4. Estates by flatute merchant or flatute flaple : 5. Estates held by elegit.

I. ESTATES upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office(b),

breach of which condition it is lawful for the grantor or his ers, to ouft him, and grant it to another person (c). For an ice, either public or private, may be forfeited by mif-ufer or n-u/er; both of which are breaches of this implied condition. Bymif-user, or abuse; as if a judge takes a bribe, or a parkeperkills deer without authority. 2. By non-user, or neglect; nich in public offices, that concern the administration of fice, or the commonwealth, is of itself a direct and immeatecause of forfeiture: but non-user of a private office is no use of forfeiture, unless some special damage is proved to be casioned thereby (d). For in the one case delay must necesily be occasioned in the affairs of the public, which require a ustantattention; but, private offices not requiring fo regular dunremitted a service, the temporary neglect of them is not ceffarily productive of mischief; upon which account some cial loss must be proved, in order to vacate these. iles also, being regal privileges in the hands of a subject, held to be granted on the same condition of making a per use of them; and therefore they may be lost and forted, like offices, either by abuse or neglect (e).

UPON the same principle proceed all the forseitures which given by law of life estates and others; for any acts done by tenant himself, that are incompatible with the estate which holds. As if tenants for life or years enseoff a stranger in simple: this is, by the common law, a forseiture of their tral estates; being a breach of the condition which the law nexes thereto, viz. that they shall not attempt to create a atter estate than they themselves are entitled to (f). So if yenants for years, for life, or in see, commit a selony; the gorother lord of the see is entitled to have their tenements, anse their estate is determined by the breach of the condition, "that they shall not commit felony," which the law itly annexes to every seodal donation.

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c) Litt. §. 379.

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(d) Co. Litt. 233.

(e) 9. Rep. 50.

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II. An estate on condition expressed in the grant itels, where an estate is granted, either in fee-simple or otherwise with an express qualification annexed, whereby the ela granted shall either commence, be enlarged, or be defeated upon performance or breach of fuch qualification or cont tion (g). These conditions are therefore either precedent subsequent. Precedent are such as must happen to be pa formed before the estate can vest or be enlarged; subseque are fuch, by the failure or non-performance of which an ela already vested may be defeated. Thus if an estate for life limited to A upon his marriage with B, the marriage is an cedent condition, and till that happens no estate (h) is ref in A. Or, if a man grant to his lessee for years, that un payment of a hundred marks within the term he shall have fee, this also is a condition precedent, and the fee-fimple pale not till the hundred marks be paid (i). But if a man grant estate in fee-simple, reserving to himself and his heirs acent rent; and that, if such rent be not paid at the times limited, shall be lawful for him and his heirs to re-enter, and avoid estate; in this case the grantee and his heirs have an estateup condition subsequent, which is defeasible if the condition be strictly performed (k). To this class may also be referred base sees, and fee-simples conditional at the common law Thus an chate to a man and his heirs, tenants of the man Dale, is an estate on condition that he and his heirs contin tenants of that manor. And so, if a personal annuity begra ed at this day to a man and the heirs of his body; as thisis tenement within the statute of Westminster the second, it mains, as at common law, a fee-fimple on condition that grantee has heirs of his body. Upon the same principleden all the determinable estates of freehold, which we mention in the eighth chapter; as durante viduitate, &c. thit estates upon condition that the grantees do not marry, and like. And on the breach of any of these subsequent co

⁽g) Co. Litt. 201. (h) Show. Parl Caf 83. &c. (l) Litt. 217. (k) Litt. §, 325. (l) See pag. 109, 110, 111

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by the failure of these contingencies; by the grantee's ontinuing tenant of the manor of Dale, by not having of his body, or by not continuing sole; the estates which respectively vested in each grantee are wholly deterand void.

DISTINCTION is however made between a condition in nd a limitation, which Littleton (m) denominates also a ion in law. For when an estate is so expressly confined mited by the words of its creation, that it cannot endure ly longer time than till the contingency happens upon the estate is to fail, this is denominated a limitation: en land is granted to a man fo long as he is parson of or while he continues unmarried, or until out of the and profits he shall have made 500!. and the like (n). cheafes the estate determines as soon as the contingency ms, (when he ceases to be parson, marries a wife, or has ed the 500l.) and the next subsequent estate, which deupon fuch determination, becomes immediately vested, ut any act to be done by him who is next in expectancy. when an estate is, strictly speaking, upon condition indeed granted expressly upon condition to be void upon the payof 40l. by the grantor, or fo that the grantee continues mied, or provided he goes to York, &c.) (o) the law its it to endure beyond the time when fuch contingency ens, unless the grantor or his heirs or assigns take advanof the breach of the condition, and make either an entry laim in order to avoid the estate (p). But, though strict sof condition be used in the creation of the estate, yet if each of the candition the estate be limited over to a third n, and does not immediately revert to the granter or his sentatives, (as if an estate be granted by A to B, on conthat within two years B intermarry with C, and on faihereof then to D and his heirs) this the law construes to be

⁽a) 10 Rep. 41. (b) 10 Rep. 41. (c) 1bid. (c) Litt. § 347. Stat. 32 Hen. VIII. c. 34.

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be a limitation and not a condition (q): because, if it were condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remain might be deseated by their neglecting to enter; but, when is a limitation, the estate of B determines, and that of Dommences, the instant that the failure happens. So also, if man by his will devise land to his heir at law, on condition that he pays a sum of money, and for non-payment devise over, this shall be considered as a limitation; otherwise advantage could be taken of the non-payment, for none the heir himself could have entered for a breach of contion (r).

In all these instances, of limitations or conditions sub quent, it is to be observed, that so long as the condition, eth express or implied, either in deed or in law, remains unbroke the grantee may have an estate of freehold, provided theel upon which such condition is annexed be in itself of a freele nature; as if the original grant express either an estate of heritance, or for life, or no estate at all, which is constructive an estate for life. For the breach of these conditions bei contingent and uncertain, this uncertainty preferves the fits hold (s); because the estate is capable to last for ever, or least for the life of the tenant, supposing the condition to main unbroken. But where the estate is at the utmost chattel interest, which must determine at a time certain, a may determine fooner, (as a grant for ninety nine years, p vided A, B, and C, or the survivor of them, shall so long in this still continues a mere chattel, and is not, by its unc tainty, ranked among estates of freehold.

These express conditions, if they be impossible at the time their creation, or afterwards become impossible by the association of the ast of the feoffor himself, or if they be control law, or repugnant to the nature of the estate, are void. In of which cases, if they be conditions subjequent, that is, to perform

⁽q) 1 Ventr. 201.

⁽c) Cro. Eliz. 205. 1 Rell Abr. 41

^() Co. Litt. 42.

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ormed after the estate is vested, the estate shall become abe in the tenant. As, if a feofiment be made to a man in imple, on condition that unless he goes to Rome in twenty hours; or unless he marries with Jane S. by fuch a day in which time the woman dies, or the feoffor marries her elf) or unless he kills another; or in case he alienes in fee; and in any of fuch cases the estate shall be vacated and mine: here the condition is void, and the estate made ute in the feoffee. For he hath by the grant the estate d in him, which shall not be defeated afterwards by a ition either impossible, illegal, or repugnant (t). But if ondition be precedent, or to be performed before the estate as a grant to a man that, if he kills another or goes to e in a day, he shall have an estate in fee; here, the void ition being precedent, the estate which depends thereon lovoid, and the grantee shall take nothing by the grant: e hath no estate until the condition be performed (u).

HERE are some estates defeasible upon condition subset, that require a more peculiar notice. Such are

LESTATES held in vadio, in gage, or pledge; which two kinds, vivum vadium, or living pledge; and morvadium, dead pledge, or mortgage.

fuppose 2001.) of another; and grants him an estate, as, of per annum, to hold till the rents and profits shall repay am so borrowed. This is an estate conditioned to be void, on as such sum is raised. And in this case the land or ge is said to be living: it subsists, and survives the debt; immediately on the discharge of that, results back to the ower (w). But mortuum vadium, a dead pledge, or sage, (which is much more common than the other) is ea man borrows of another a specific sum (e. g. 2001.)

(t) Co. Litt. 206, (u) Tbid. (w) Ibid. 205.

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and grants him an estate in fee, on condition that if mortgagor, shall repay the mortgagee the faid sum of 200 a certain day mentioned in the deed, that then the morn may re-enter on the estate so granted in pledge; or, as the more usual way, that the mortgagee shall re-come estate to the mortgagor: in this case the land, whichis in pledge, is by law, in case of non-payment at the time in for ever dead and gone from the mortgagor; and the m gee's estate in the lands is then no longer conditional, b folute. But, folong as it continues conditional, that is, be the time of lending the money, and the time allotted for ment, the mortgagee is called tenant in mortgage (x). as it was formerly a doubt (y), whether, by taking fuch in fee, it did not become liable to the wife's dower, and incumbrances of the mortgagee (though that doubt ha long ago over-ruled by our courts of equity (z) it the became usual to grant only a long term of years, by mortgage; with condition to be void on re-payment mortgage-money: which course has been fince cont principally because on the death of the mortgagee sud becomes vested in his personal representatives, who all entitled in equity to receive the money lent, of whater ture the mortgage may happen to be.

As foon as the estate is created, the mortgagee may diately enter on the lands; but is liable to be dispossed performance of the condition by payment of the mortgageney at the day limited. And therefore the usual wayist that the mortgagor shall hold the land till the day assign payment; when, in case of failure, whereby the estate be absolute, the mortgagee may enter upon it and take powithout any possibility at law of being afterwards evided mortgagor, to whom the land is now for ever dead. Be again the courts of equity interpose; and though a magain the courts of equity interpose; and though a magain the second seco

⁽x) Litt. § 332. (y) Ibid. §. 357. Cro. Car. 191. Hardr. 466.

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thus forfeited, and the estate absolutely vested in the mortree at the common law, yet they will confider the real value the tenements compared with the fum borrowed. And, if estate be of greater value than the sum lent thereon, they lallow the mortgagor at any reasonable time to re-call or eem his estate; paying to the mortgagee his principal; ineft, and expences: for otherwise, in strictness of law, an te worth 1000/. might be forfeited for non-payment of d or a less fum. This reasonable advantage, allowed to rtgagors, is called the equity of redemption: and this enables ortgagor to call on the mortgagee, who has possession of his te, to deliver it back and account for the rents and profits eived, on payment of his whole debt and interest; thereby ning the mortuum into a kind of vivum vadium. But, on other hand, the mortgagee may either compel the fale of estate in order to get the whole of his money immediately; le call upon the mortgagor to redeem his estate presently, in default thereof, to be for ever foreclosed from redeeming same; that is, to lose his equity of redemption without ibility of re-call. And also in some cases of fraudulent rtgages (a), the fraudulent mortgagor forfeits all equity of emption what foever. It is not, however, usual for mortgas to take possession of the mortgaged estate, unless where fecurity is precarious, or fmall; or where the mortgagor lects even the payment of interest; when the mortgagee requently obliged to bring an ejectment, and take the land his own hands, in the nature of a pledge, or the pignus he Roman law: whereas, while it remains in the hands of mortgagor, it more resembles their hypotheca, which was ere the possession of the thing pledged, remained with the tor(b). But, by statute 7 Geo. II. c. 20. after payment or tenbythe mortgagor of principal, interest, and costs, the mortte can maintain no ejectment; but may be compelled to remais securities. In Glanvil's time, when the universal method

¹⁾ Stat. 4 & 5 W. & M. c. 16. (b) Pignoris appellatione proprie remcontineri dicimus, quae simul etiam traditur creri. At eam, quae sine traditione nuda conventione tonetur, prohypothecae appellatione contineri dicimus. Inst. l. 4. t. 6. §. 7.

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thod of conveyance was by livery of seisin or corporal tradit of the lands, no gage or pledge of lands was good unless possion was also delivered to the creditor; "si non sequaturing wadii traditio, curia domini regis bujusmodi privatas of wentiones tueri non solet: for which the reason given to prevent subsequent and fraudulent pledges of the saland; "cum in tali casu possit eadem res pluribus aliis credit ribus tum prius tum posserius invadiari (c)." And frauds which have arisen, since the exchange of these pub and notorious conveyances for more private and secret bargai have well evinced the wissom of our antient law.

IV. A FOURTH species of estates, defeasible on conditi fubsequent, are those held by flatute merchant, and flatute ple; which are very nearly related to the vivum vadium fore-mentioned, or estate held till the profits thereof shall charge a debt liquidated or ascertained. For both the statutem chant and statute staple are securities for money; the one tered into purfuant to the statute 13 Edw. I. de mercatoril and thence called a statute merchant; the other pursuant to statute 27 Edw. III. c. 9. before the mayor of the staple, is to fay, the grand mart for the principal commodities on nufactures of the kingdom, formerly held by act of parliam in certain trading towns (d), and thence this fecurity is al a statute staple. They are both, I say, securities for del originally permitted only among traders, for the benefit commerce; whereby the lands of the debtor are conveyed the creditor, till out of the rents and profits of them his d may be fatisfied: and, during fuch time as the creditor so ho the lands, he is tenant by statute merchant or statute stap There is also a similar security, the recognizance in the nat of a statute staple, which extends the benefit of this merca tile transaction to all the king's subjects in general, by vir of the statute 23 Hen. VIII. c. 6.

V. ANOTHER similar conditional estate, created by operation of law, for security and satisfaction of debts, is called anest

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elegit. What an elegit is, and why fo called, will be exined in the third part of these commentaries. At present eed only mention, that it is the name of a writ, founded the statute (e) of Westm. 2. by which, after a plaintiff obtained judgment for his debt at law, the theriff gives possession of one half of the defendant's lands and tenents, to be held, occupied, and enjoyed, until his debt and nages are fully paid: and during the time he fo holds m, he is called tenant by elegit. It is easy to observe, this is also a mere conditional estate, defeasible as soon the debt is levied. But it is remarkable, that the feodal raints of alienating lands, and charging them with the ts of the owner, were foftened much earlier and much re effectually for the benefit of trade and commerce, than any other confideration. Before the statute of quia empu(f) it is generally thought that the proprietor of lands senabled to alienate no more than a moiety of them: the ute therefore of Westm. 2. permits only so much of them be affected by the process of law, as a man was capable of enating by his own deed. But by the statute de mercatow (passed in the same year) (g) the whole of a man's lands sliable to be pledged in a statute merchant, for a debt confled in trade; though only half of them was liable to be en in execution for any other debt of the owner.

I SHALL conclude what I had to remark of these estates by the merchant, statute staple, and elegit, with the observan of sir Edward Coke (h). "These tenants have untertain interests in lands and tenements, and yet they have
but chattels and no freeholds;" (which makes them an extion to the general rule) "because though they may hold
an estate of inheritance, or for life, ut liberum tenementum,
antil their debt be paid; yet it shall go to their executors:
for ut is similitudinary; and though, to recover their eslates, they shall have the same remedy (by assist) as a
Vol. II. "tenant

e) 13 Edw. I. c. 18. (f) 18 Edw. I. (g) 13 Edw. I. Inft. 42, 43.

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" tenant of the freehold shall have, yet it is but the family " tude of a freehold, and nullum simile est idem." This inde only proves them to be chattel interests, because they go the executors, which is inconsistent with the nature of a fre hold: but it does not affign the reason why these estates, contradiffinction to other uncertain interests, shall vet the executors of the tenant and not the heir: which is m bably owing to this: that, being a fecurity and remedy vided for personal debts owing to the deceased, to wh debts the executor is entitled, the law has therefore thus rected their succession; as judging it reasonable, from and ciple of natural equity, that the fecurity and remedy how be vested in them, to whom the debts if recovered would long. And, upon the same principle, if lands be deni to a man's executor, until out of their profits the debts d from the testator be discharged, this interest in the lands in be a chattel interest, and on the death of such executor shall to his executors (i): because they, being liable to pay the ginal testator's debts, so far as his affets will extend, an reason entitled to possess that fund, out of which he has rected them to be paid.

(i) Co. Litt. 42.

Rindrobane, the rectargle, and regres, write the clinician of the Edward Color (a).

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to A fortwenty years, and, after the determination of the he term, then A True Ve Je Bu eller Ve a True A D chan he was permander to K in fee. In the first place an estate he

as of remainder of it is given to B. Hen loads

11. An effete then in remainder may be defined to be effect that to be supported to take color and be enjoyed after unother electer and head in fee-fimple granteh lind is descripted. As if a man lifted in fee-fimple granteh lind

OF ESTATES IN POSSESSION, REMAINDER,

cat farts, but they conflicute only one while they a cared out of one and the fame inheritance; they are but creater, and may both fubfile, together; the one in pole

vers a crested of curved one of the fee, and given to A; at

ITHERTO we have considered estates solely with regard to their duration, or the quantity of interest which is owners have therein. We are now to consider them in nother view; with regard to the time of their enjoyment, hen the actual pernancy of the profits (that is, the taking, exception, or receipt, of the rents and other advantages sing therefrom) begins. Estates therefore, with respect this consideration, may either be in possession, or in expectancy: and of expectancies there are two sorts; one created yact of the parties, called a remainder; the other by act slaw, and called a reversion.

I. Or estates in possession, (which are sometimes called estates recuted, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or ontingency, as in the case of estates executory) there is litter or nothing peculiar to be observed. All the estates we are hitherto spoken of, are of this kind; for, in laying own general rules, we usually apply them to such estates as the then actually in the tenant's possession. But the doctrine seltates in expectancy contains some of the nicest and most obstructed learning in the English law. These will therefore equire a minute discussion, and demand some degree of attention.

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II. An estate then in remainder may be defined to be, a estate limited to take effect and be enjoyed after another eller is determined. As if a man feifed in fee-fimple granteth land to A for twenty years, and, after the determination of the fair term, then to B and his heirs for ever: here A is tenant for years, remainder to B in fee. In the first place an estate for years is created or carved out of the fee, and given to A; and the residue or remainder of it is given to B. But both the interests are in fact only one estate; the present term of year and the remainder afterwards, when added together, bein equal only to one estate in fee (a). They are indeed differ ent parts, but they constitute only one whole: they a carved out of one and the same inheritance: they are bot created, and may both fubfift, together; the one in polled fion, the other in expectancy. So if land be granted to Afe twenty years, and after the determination of the faid tem B for life; and, after the determination of B's effate for life it be limited to C and his heirs for ever; this makes A tent for years, with remainder to B for life, remainder over C in fee. Now here the estate of inheritance undergoes a di fion into three portions: there is first A's effate for jet carved out of it; and after that B's estate for life; and the the whole that remains is limited to C and his heirs. A here also the first estate, and both the remainders, for life at in fee, are one estate only; being nothing but parts or po tions of one entire inheritance: and if there were a hundre remainders, it would ftill be the fame thing; upon a princ ple grounded in mathematical truth, that all the parts a equal, and no more than equal, to the whole. And hen also it is easy to collect, that no remainder can be limit after the grant of an estate in fee-simple (b) : because a sa simple is the highest and largest estate, that a subject is pable of enjoying: and he that is tenant in fee, hath in his the whole of the estate: a remainder therefore, which only a portion, or refiduary part, of the estate, cannot reserved after the whole is disposed of. A particular ela

⁽a) Co. Litt. 143.

⁽b) Plowd. 29. Vaugh, 269.

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ith all the remainders expectant thereon, is only one feeinple; as 401, is part of 1001. and 601. is the remainder of wherefore, after a fee-simple once vested, there can no one be a remainder limited thereon, than after the whole ool is appropriated there can be any residue subsisting.

Thus much being premised, we shall be the better enled to comprehend the rules that are laid down by law to observed in the creation of remainders, and the reasons on which those rules are founded.

in AND, first, there must necessarily be some particular ate, precedent to the estate in remainder (c). As, an estate for years to A, remainder to B for life; or, an estate for to A, remainder to B in tail. This precedent estate is led the particular estate, as being only a small part, or ricula, of the inheritance; the residue or remainder of which granted over to another. The necessity of creating this presing particular estate, in order to make a good remainder, see from this plain reason; that remainder is a relative expession, and implies that some part of the thing is previously posed of: for, where the whole is conveyed at once, there must possibly exist a remainder; but the interest granted, tatever it be, will be an estate in possession.

An estate created to commence at a distant period of time, thout any intervening estate, is therefore properly no resinder: it is the whole of the gift, and not a residuary at. And such future estates can only be made of chattel terests, which were considered in the light of mere constably the antient law (d), to be executed either now or reaster, as the contracting parties should agree; but an estate of freehold must be created to commence immediately. It is an antient rule of the common law, that no estate of schold can be created to commence in future; but it ought take effect presently either in possession or remainder (e): cause at common law no freehold in lands could pass

(c) Co. Litt. 49. Plowd. 25.

(d) Raym. 151.

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without livery of seisin; which must operate either imme ately, or not at all. It would therefore be contradictory, an estate, which is not to commence till hereafter, could granted by a conveyance which imports an immediate polle fion. Therefore, though a lease to A for seven years, toom mence from next Michaelmas, is good; yet a conveya to B of lands, to hold to him and his heirs for ever fro the end of three years next enfuing, is void. So that wh it is intended to grant an estate of freehold, whereof enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist that period of time is completed; and for the grantor to liver immediate possession of the land to the tenant of particular estate, which is construed to be giving possess to him in remainder, fince his estate and that of the partie lar tenant are one and the same estate in law. As, wh one leases to A for three years, with remainder to Binf and makes livery of seisin to A; here by the livery freehold is immediately created, and vefted in B, dur the continuance of A's term of years. The whole e passes at once from the grantor to the grantees, and the mainder-man is seised of his remainder at the same times the termor is possessed of his term. The enjoyment of must indeed be deferred till hereafter; but it is to all inte and purposes an estate commencing in praesenti, though be occupied and enjoyed in futuro.

As no remainder can be created, without fuch a preced particular estate, therefore the particular estate is said to port the remainder. But a leafe at will is not held to be a particular estate, as will support a remainder over (f). an estate at will is of a nature so slender and precarious, the is not looked upon as a portion of the inheritance; and ap tion must first be taken out of it, in order to constitutes mainder. Besides, if it be a freehold remainder, liver feifin must be given at the time of its creation; and the of the grantor, to do this, determines the estate at will in

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ry instant in which it is made (g); or, if it be a chattel inest, though perhaps it might operate as a future contract,
the tenant for years be a party to the deed of creation,
tit is void by way of remainder: for it is a separate indendent contract, distinct from the precedent estate at will;
devery remainder must be part of one and the same estate,
tof which the preceding particular estate is taken (h). And
nce it is generally true, that if the particular estate is void
its creation, or by any means is defeated afterwards, the
nainder supported thereby shall be defeated also (i): as
here the particular estate is an estate for the life of a person
tin esse (k); or an estate for life upon condition, on breach
which condition the grantor enters and avoids the estate (1);
wither of these cases the remainder over is void.

A SECOND rule to be observed is this; that the remainmust commence or pass out of the grantor at the time of creation of the particular estate (m). As, where there is estate to A for life, with remainder to B in fee : here B's ainder in fee passes from the grantor at the same time that nis delivered to A of his life estate in possession. And it is , which induces the necessity at common law of livery of in being made on the particular estate, whenever a freehold mainder is created. For, if it be limited even on an estate for rs, it is necessary that the lessee for years should have liy of seisin, in order to convey the freehold from and out of grantor; otherwise the remainder is void (n). Not that livery is necessary to strengthen the estate for years; but, ivery of the land is requisite to convey the freehold, and cannot be given to him in remainder, without infringing possession of the lessee for years, therefore the law allows livery, made to the tenant of the particular estate, to te and enure to him in remainder, as both are but one estate aw (o).

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3. A THIRD

¹⁾ Dyer. 18. (h) Raym. 151. (i) Co. Litt. 298.
2 Rell. Ab , 415. (l) 1 Jon. 58. (m) Litt. § 671.
d. 25. (n) Litt. § 60. (o) Co. Litt. 49.

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3. A THIRD rule respecting remainders is this; that the mainder must vest in the grantee during the continuance the particular estate, or eo instanti that it determines (p). if A be tenant for life, remainder to B in tail; here B's mainder is vested in him, at the creation of the particular eftate to A for life; or, if A and B be tenants for their joi lives, remainder to the furvivor in fee; here, tho' during the joint lives the remainder is vested in neither, yet on thede of either of them, the remainder vefts instantly in the fur vor: wherefore both these are good remainders. But, if oftate be limited to A for life, remainder to the eldeft for B in tail, and A dies before B hath any fon; here the remains der will be void, for it did not vest in any one during the tinuance, nor at the determination, of the particular ela and, even supposing that B should afterwards have a for, shall not take by this remainder; for, as it did not well at before the end of the particular estate, it never can vestat but is gone for ever (q). And this depends upon the princi before laid down, that the precedent particular estate and remainder are one estate in law: they must therefore sub and be in effe at one and the fame inftant of time, eitherd ing the continuance of the first estate, or at the very inter when that determines, fo that no other effate can possi come between them. For there can be no intervening en between the particular estate, and the remainder support thereby (r): the thing supported must fall to the ground, once its support be severed from it.

It is upon these rules, but principally the last, that the determine of contingent remainders depends. For remainders either vessed or contingent. Vested remainders (or remainders executed, whereby a present interest passes to the parthough to be enjoyed in futuro) as where the estate is invalid ably fixed, to remain to a determinate person, after the passes.

⁽p) Plowd. 25. 1 Rep. 66.

^{(9) 1} Rep. 138

⁽r) 3 Rep. 21.

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ular estate is spent. As if A be tenant for twenty years, mainder to B in see; here B's is a vested remainder, which thing can deseat, or set aside.

CONTINGENT or executory remainders (whereby no preminterest passes) are where the estate in remainder is limito take effect, either to a dubious and uncertain person, or on a dubious and uncertain event; so that the particular ate may chance to be determined, and the remainder never the effect (s).

FIRST, they may be limited to a dubious and uncertain for. As if A be tenant for life, with remainder to B's elfion (then unborn) in tail; this is a contingent remainder, it is uncertain whether B will have a fon or no: but the ant that a fon is born, the remainder is no longer continnt, but vested. Though, if A had died before the continmy happened, that is, before B's fon was born, the reinder would have been absolutely gone; for the particular ate was determined before the remainder could vest. Nay, the strict rule of law, if A were tenant for life, remainder his own eldest son in tail, and A died without issue born. t leaving his wife enseint or big with child, and after his ath a posthumous son was born, this son could not take the d, by virtue of this remainder; for the particular estate termined before there was any person in esse, in whom the mainder could vest (t). But, to remedy this hardship, it is afted by statute 10 & 11 W. III. c. 16. that posthumous idren shall be capable of taking in remainder, in the same mmer as if they had been born in their father's life-time: atis, the remainder is allowed to vest in them, while yet in ar mother's womb (u).

This species of contingent remainders, to a person not in ing, must however be limited to some one, that may by minon possibility, or potentia propinqua, be in esse at or some the particular estate determines (w). As if an estate be H 5 made

⁽b) 3 Rep. 20. (t) Salk. 228. 4 Mod. 282. (u) See Vol. (w) 2 Rep. 51.

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made to A for life, remainder to the heirs of B: now, if A dies before B, the remainder is at an end; for during B's life he has no heir, nemo est baeres viventis: but if B dies fin the remainder then immediately vests in the heir, who will he entitled to the land on the death of A. This is a good contin gent remainder, for the possibility of B's dying before A potentia propingua, and therefore allowed in law (x). But remainder to the right heirs of B (if there be no fuch perfor B in effe) is void (y). For here there must two contingence happen; first, that such a person as B shall be born; and fecondly, that he shall also die during the continuance of the particular estate; which make it potentia remotissima a mo improbable possibility. A remainder to a man's eldes for who hath none, (we have feen) is good; for by common po fibility he may have one; but if it be limited in particular his fon John, or Richard, it is bad, if he have no fon of the name; for it is too remote a possibility that he should not on have a fon, but a fon of a particular name (z). A limitate of a remainder to a bastard before it is born; is not good a for though the law allows a possibility of having bastards, prefumes it to be a very remote and improbable contingent Thus may a remainder be contingent, on account of them certainty of the person who is to take it.

A REMAINDER may also be contingent, where the per to whom it is limited is fixed and certain, but the event up which it is to take effect is vague and uncertain. As, whe land is given to A for life, and in cafe B furvives him, the with remainder to B in fee: here B is a certain person, the remainder to him is a contingent remainder, depend upon a dubious event, the uncertainty of his furviving During the joint lives of A and B it is contingent: and dies first, it never can vest in his heirs, but is for ever got but if A dies first, the remainder to B becomes vested. by much however be directed to force one, they may by

CONTINGED OF PERSONNELS SENTENCES SO VILLE CONTINGED

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donth's particular effects determined (x) Co. Litt. 378. (y) Hob. 33. (z) 5 Rep. 51. Cro. Eliz. 509.

CONTINGENT remainders of either kind, if they amount of a freehold, cannot be limited on an estate for years, or any ther particular estate, less than a freehold. Thus if land be ranted to A for ten years, with remainder in fee to the right eirs of B, this remainder is void (b): but if granted to A for ife, with a like remainder, it is good. For, unless the free-old passes out of the grantor at the time when the remainder screated, such freehold remainder is void: it cannot pass out fhim, without vesting somewhere; and in the case of a coningent remainder it must vest in the particular tenant, else tean vest no where: unless therefore the estate of such particular tenant be of a freehold nature, the freehold cannot est in him, and consequently the remainder is void.

CONTINGENT remainders may be defeated, by destroying rdetermining the particular estate upon which they depend efore the contingency happens whereby they become vefted c). Therefore when there is tenant for life, with divers emainders in contingency, he may, not only by his death, ut by alienation, furrender, or other methods, destroy and etermine his own life estate, before any of those remainders eft; the consequence of which is that he utterly defeats them II. As, if there be tenant for life, with remainder to his ldest son unborn in tail, and the tenant for life, before any on is born, furrenders his life-estate, he by that means deeats the remainder in tail to his fon: for his fon not being resse, when the particular estate determined, the remainder ould not then vest; and, as it could not vest then, by the ules before laid down, it never can vest at all. In these cases herefore it is necessary to have trustees appointed to preserve he contingent remainders; in whom there is vested an estate remainder for the life of the tenant for life, to commence then his determines. If therefore his estate for life deternines otherwise than by his death, their estate, for the resihe of his natural life, will then take effect, and become a particular

⁽b) 1 Rep. 130.

⁽c) Ibid. 66. 135.

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ders depending in contingency. This method is said to hat been invented by fir Orlando Bridgman, sir Geoffery Palme and other eminent council, who betook themselves to conveyancing during the time of the civil wars; in order there to secure in family settlements a provision for the suture children of an intended marriage, who before were usually less the mercy of the particular tenant for life (d): and when, a ter the restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reason able and proper bounds, and introduced it into general use

THUS the student will observe how much nicety is require in creating and fecuring a remainder; and I trust he will fome measure see the general reasons, upon which this nice is founded. It were endless to attempt to enter upon the pa ticular subtilties and refinements, into which this doctrin by the variety of cases which have occured in the course many centuries, has been spun out and subdivided: neith are they consonant to the defign of these elementary disquit tions. I must not however omit, that in devises by last w and testament, (which, being often drawn up when the part is inops confilii, are always more favoured in confruction than formal deeds, which are prefumed to be made with gre caution, fore-thought, and advice) in these devises, I is remainders may be created in some measure contrary to t rules before laid down: though our lawyers will not allo fuch dispositions to be firstly remainders; but call them another name, that of executory devises, or devises hereaft to be executed.

An executory devise of lands is such a disposition of the by will, that thereby no estate vests at the death of the devise but only on some future contingency. It differs from an mainder in three very material points: 1. That it needs no

⁽d) See Moor. 486. 2 Roll. Abr. 797. pl. 12. 2 Sid. 159. Chan. Rep. 170.

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y particular estate to support it. 2. That by it a fee-simor other less estate, may be limited after a fee-simple. That by this means a remainder may be limited of a chatinterest, after a particular estate for life created in the same.

I. THE first case happens when a man devises a future ne, to arise upon a contingency; and, till that contingency pens, does not dispose of the fee-simple, but leaves it to tend to his heir at law. As if one devices land to a femeand her heirs upon her day of marriage: here is in effect ontingent remainder without any particular estate to suptit; a freehold commencing in future. This limitation, ugh it would be void in a deed, yet it is good in a will, by yof executory devise (e). For, fince by a devise a freed may pass without corporal tradition or livery of seisin, it must do, if it passes at all) therefore it may commence uturo; because the principal reason why it cannot comnce in futuro in other cases, is the necessity of actual seisin, ich always operates in praesenti. And, fince it may thus mence in futuro, there is no need of a particular estate to port it; the only use of which is to make the remainder. its unity with the particular estate, a present interest. dhence also it follows, that fuch an executory devise, not ig a present interest, cannot be barred by a recovery, suf-id before it commences (f).

By executory devise a fee, or other less estate, may be lied after a fee. And this happens where a devisor devises
whole estate in fee, but limits a remainder thereon to comnee on a future contingency. As if a man devises land to
nd his heirs; but if he dies before the age of twenty-one,
nto Band his heirs: this remainder, though void in a deed,
ood by way of executory devise (g). But in both these
less of executory devises, the contingencies ought to be
as may happen within a reasonable time; as within one

(e) 1 Sid. 153. (f) Cro. Jac. 593. (g) 2 Mod. 289.

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or more life or lives in being, or within a moderate term years; for courts of justice will not indulge even wills, in to create a perpetuity, which the law abhors (h): because perpetuities, or the fettlement of an interest, which shall in the fuccession prescribed, without any power of alice tion (i), estates are made incapable of answering those on of focial commerce, and providing for the fudden conting cies of private life, for which property was at first establish The utmost length that has been hitherto allowed, for contingency of an executory devise of either kind to hap in, is that of a life or lives in being, and one and twe years afterwards. As when lands are devised to such unb fon of a feme-covert, as shall first attain the age of two one, and his heirs; the utmost length of time that can h pen before the estate can vest, is the life of the mother and subsequent infancy of her son: and this hath been decree be a good executory devise (k).

3. By executory devise a term of years may be given to man for his life, and afterwards limited over in remainde another, which could not be done by deed: for by law first grant of it, to a man for life, was a total disposition the whole term; a life estate being esteemed of a higher larger nature than any term of years (1). And, at firth courts were tender, even in the case of a will, of refran the devisee for life from aliening the term; but only that in case he died without exerting that act of owner the remainder over should then take place (m): for the straint of the power of alienation, especially in very terms, was introducing a species of perpetuity. But, afterwards, it was held (n), that the devisee for life hat power of aliening the term, so as to bar the remainderyet in order to prevent the danger of perpetuities, it was tled (0), that though fuch remainders may be limited many persons successively as the devisor thinks proper,

⁽h) 12 Mod. 287. 1 Vern. 164. (i) Salk. 229. Forr. 232. (l) 8 Rep. 95. (m) Bro. tit chatteles 23. 74. (n) Dyer. 358. 8 Rep. 96. (o) 1 Sid. 451.

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y must all be in esse during the life of the first devisee; then all the candles are lighted and are consumed together, theultimate remainder is in reality only to that remainder who happens to survive the rest: or, that such remainder y be limited to take effect upon such contingency only, as if happen (if at all) during the life of the first devisee (p).

Thus much for such estates in expectancy, as are created the express words of the parties themselves; the most inate title in the law. There is yet another species, which treated by the act and operation of the law itself, and this alled a reversion.

II. An estate in reversion is the residue of an estate left in grantor, to commence in possession after the determination ome particular estate granted out by him (q). Sir Edward ke (r) describes a reversion to be the returning of land to grantor or his heirs after the grant is over. As, if there gift in tail, the reversion of the fee is, without any sperefervation, vested in the donor by act of law: and to also reversion, after an estate for life, years, or at will, conles in the lessor. For the fee-simple of all lands must le somewhere; and if he, who was before possessed of the de, carves out of it any smaller estate, and grants it away, stever is not so granted remains in him. A reversion is er therefore created by deed or writing, but arises from fruction of law; a remainder can never be limited, unless either deed or devise, But both are equally transferable, n actually vested, being both estates in praesenti, though ng effect in futuro.

the doctrine of reversions is plainly derived from the feodal fitution. For, when a feud was granted to a man for life, him and his issue male, rendering either rent, or other ices; then, on his death or the failure of issue male, the

) Skinn. 341. 3 P. Wms. 258. (q) Co. Litt. 22. (r)

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feud was determined and refulted back to the lord or prop tor, to be again disposed of at his pleasure. And hence usual incidents to reversions are said to be fealty and n When no rent is referved on the particular estate, fealty he ever refults of course, as an incident quite inseparable, may be demanded as a badge of tenure, or acknowlegen of superiority; being frequently the only evidence that lands are holden at all. Where rent is referved, it is incident, though not infeparably fo, to the reversion (s). rent may be granted away, referving the reversion; and reversion may be granted away, referving the rent; by cial words: but by a general grant of the reversion, the will pass with it, as incident thereto; though by the gran the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not e converso: the maxim of law is, " accessorium non ducit, sed sequi " fuum principale (t).

THESE incidental rights of the reversioner, and the ref tive modes of descent, in which remainders very freque differ from reversions, have occasioned the law to be can in diftinguishing the one from the other, however inaccura the parties themselves may describe them. For if one, if of a paternal estate in fee, makes a lease for life, with rem der to himself and his heirs, this is properly a mere re fion (u), to which rent and fealty shall be incident; which shall only descend to the heirs of his father's bl and not to his heirs general, as a remainder limited to his a third person would have done (w): for it is the older which was originally in him, and never yet was out of And so likewise, if a man grants a lease for life to A, re ing rent, with reversion to B and his heirs, B hath a ren der descendible to his heirs general, and not a reverse which the rent is incident; but the grantor shall be ent to the rent during the continuance of A's estate (x).

⁽s) Co. Litt. 143. (w) 3 Lev. 407.

⁽t) lbid. 151, 152. (x) 1 And. 23.

⁽u) Cro. Eliz.

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reversion, or expectancy, after the death of others, inft fraudulent concealments of their deaths, it is enacted the statute 6 Ann. c. 18. that all persons on whose lives any dsor tenements are holden, shall (upon application to the stof chancery and order made thereupon) once in every s, if required, be produced to the court, or its commissions; or, upon neglect or refusal, they shall be taken to be sally dead, and the person entitled to such expectant estate y enter upon and hold the lands and tenements, till the syshall appear to be living.

EFORE we conclude the doctrine of remainders and revers, it may be proper to observe, that whenever a greater gand a less coincide and meet in one and the same person, bout any intermediate estate (y), the less is immediately inlated; or, in the law phrase, is said to be merged, that fink or drowned, in the greater. Thus, if there be tetfor years, and the reversion in fee-simple descends to or urchased by him, the term of years is merged in the inheace, and shall never exist any more. But they must come ne and the same person, in one and the same right; else, freehold be in his own right, and he has a term in right mother (en auter droit) there is no merger. Therefore, nant for years dies, and makes him who hath the reverin fee his executor, whereby the term of years vests also in, the term shall not merge; for he hath the fee in his right, and the term of years in the right of the testator, subject to his debts and legacies. So also, if he who hath reversion in fee marries the tenant for years, there is no ger; for he hath the inheritance in his own right, the leafe ight of his wife (z). An estate-tail is an exception to mile: for aman may have in his own right both an estateand a reversion in fee; and the estate-tail, though a less t, shall not merge in the fee (a). For estates-tail are protected

³ Lev. 437. (2) Plow. 418. Jac. 275. Co. Litt. 338, 2 Rep. 61. 8 Rep. 74.

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tected and preserved from merger by the operation and o struction, though not by the express words of the statute donis: which operation and construction have probably an upon this confideration; that, in the common cases of men of estates for life or years by uniting with the inheritance. particular tenant hath the fole interest in them, and hath power at any time to defeat, destroy, or surrender them him that hath the reversion; therefore, when such an ef unites with the reversion in fee, the law considers it in light of a virtual furrender of the inferior estate (b). Bu an estate-tail, the case is otherwise: the tenant for a le time had no power at all over it, so as to bar or destroy and now can only do it by certain special modes, by afin recovery, and the like (c): it would therefore have h frangely improvident, to have permitted the tenant in by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue: and hend has become a maxim, that a tenancy in tail, which can be furrendered, cannot also be merged in the fee.

(b) Cro. Eliz. 302.

(c) See pag. 116.

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CHAPTER THE TWELFTH.

ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

TE come now to treat of estates, with respect to the number and connections of their owners, the tenants occupy and hold them. And considered in this view, es of any quality or length of duration, and whether they a actual possession or expectancy, may be held in four rent ways; in severalty, in joint-tenancy, in coparcenary, in common.

He that holds lands or tenements in feweralty, or is sole in thereof, is he that holds them in his own right only, out any other person being joined or connected with him oint of interest, during his estate therein. This is the common and usual way of holding an estate; and therewe may make the same observations here, that we did restates in possession, as contradistinguished from those pectancy, in the preceding chapter: that there is little othing peculiar to be remarked concerning it, since all as are supposed to be of this sort, unless where they are essly declared to be otherwise; and that, in laying down ral rules and doctrines, we usually apply them to such as as are held in severalty. I shall therefore proceed to der the other three species of estates, in which there are year a plurality of tenants.

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II. An estate in joint-tenancy is where lands or teneme are granted to two or more persons, to hold in see-simple, tail, for life, for years, or at will. In consequence of such the estate is called an estate in joint-tenancy (a), and sometian estate in jointure, which word as well as the other sign a union or conjunction of interest; though in common so the term, jointure, is now usually confined to that i estate, which by virtue of the statute 27 Hen. VIII. c. 10 frequently vested in the husband and wife before marriage a full satisfaction and bar of the woman's dower (b).

In unfolding this title, and the two remaining ones in present chapter, we will first enquire, how these estates be created; next, their properties and respective incide and lastly, how they may be severed or destroyed.

- wording of the deed or devise, by which the tenants claim the; for this estate can only arise by purchase or grant, is, by the act of the parties, and never by the mere act of Now, if an estate be given to a plurality of persons, with adding any restrictive, exclusive, or explanatory words, an estate be granted to A and B and their heirs, this may them immediately joint-tenants in see of the lands. For law interprets the grant so as to make all parts of it take feet, which can only be done by creating an equal estate in the both. As therefore the grantor has thus united their names law gives them a thorough union in all other respects,
- which is fourfold; the unity of interest, the unity of title, unity of time, and the unity of possession: or, in other wo joint-tenants have one and the same interest, accruing by and the same conveyance, commencing at one and the time, and held by one and the same undivided possession.

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inst, they must have one and the same interest. One tenant cannot be entitled to one period of duration or ity of interest in lands, and the other to a different : one ot be tenant for life, and the other for years : one canbe fenant in fee, and the other in tail (c). But, if be limited to A and B for their lives, this makes them tenants of the freehold; if to A and B and their it makes them joint tenants of the inheritance If land be granted to A and B for their lives o the heirs of A; here A and B are joint tenants freehold during their respective lives, and A the remainder of the fee in feveralty: or, if land ven to A and B, and the heirs of the body of A; here have a joint effate for life, and A hath a feveral reher in tail (e). Secondly, foint-tenants must also have ity of title: their estate must be created by one and the act, whether legal or illegal; as by one and the fame for by one and the fame diffeilin (f). Joint-tenancy varife by descent or act of law; but merely by puror acquilition by the act of the party: and, unless that one and the fame, the two tenants would have differles; and if they had different titles, one might prove and the other bad, which would absolutely destroy the re. Thirdly, there must also be an unity of time: their must be vested at one and the same period, as well by nd the fame title. As in case of a present estate made and B; or a remainder in fee to A and B after a partithate; in either case A and B are joint-tenants of this testate, or this vested remainder. But if, after a lease e, the remainder be limited to the heirs of A and B; uring the continuance of the particular estate A dies, vests the remainder of one moiety in his heir; and dies, whereby the other moiety becomes vested in the B: now A's heir and B's heir are not joint-tenants of mainder, but tenants in common; for one moiety vested time, and the other moiety vosted at another (g). Yet,

Co. Litt. 188. (d) Litt. §. 277. (e) Ibid. §. 285. (f) Ibid. (g) Co. Litt. 188.

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where a feoffment was made to the use of a man, and wife as he should afterwards marry, for term of their in and he afterwards married; in this cafe it feems to been held that the husband and wife had a joint estate, the vested at different times (h): because the use of the estate was in abeyance and dormant till the intername and, being then awakened, had relation back, and effect from the original time of creation. Laftly, in it tenancy, there must be an unity of possession. Joint-ten are faid to be feifed per my et per tout, by the half or me and by all; that is, they each of them have the entirem fion, as well of every parcel as of the whole (i). They not, one of them a feifin of one half or moiety, and thee of the other moiety; neither can one be exclusively sein one acre, and his companion of another; but each have undivided moiety of the whole, and not the whole of an divided moiety (k).

UPON these principles, of a thorough and intimaten of interest and possession, depend many other conseque and incidents to the joint-tenant's estate. If two joint nants let a verbal lease of their land, reserving rent paid to one of them, it shall enure to both, in respe the joint reversion (1). If their lessee surrenders his la one of them, it shall also enure to both, because of the vity, or relation of their estate (m). On the same m livery of feifin, made to one joint-tenant, shall enu both of them (n): and the entry, or re-entry, of one tenant is as effectual in law as if it were the act of (o). In all actions also relating to their joint a one joint-tenant cannot fue or be fued without joining other (p). But if two or more joint-tenants be of an advowson, and they present different clerks, bishop may refuse to admit either; because joint-tenant hath a several right of patronage, but ea

⁽h) Dyer. 340. 1 Rep. 101. (i) Litt. §. 288, 5 Rep. 10. Quilibet totum tenet et nihil tenet; scilicet totum in communihil separatim per se. Bract. l. 5. c. 26. (l) Co. Litt. (m) Ibid. 192. (n) Ibid. 49. (o) Ibid. 319. 364. (p) lbid.

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ed of the whole : and, if they do not both agree within fix nths, the right of presentation shall lapse. But the ordiy may, if he pleases, admit a clerk presented by either, the good of the church, that divine fervice may be reguperformed; which is no more than he otherwise would entitled to do, in case their disagreement continued, so as neur a lapse : and, if the clerk of one joint-tenant be so nitted, this shall keep up the title in both of them; in retof the privity and union of their estate (q). Upon the e ground it is held, that one joint-tenant cannot have an on against another for trespass, in respect to the land (r): each has an equal right to enter upon any part of it. But joint-tenant is not capable by himself to do any act, ch may tend to defeat or injure the estate of the other; as et leases, or to grant copyholds (s): and if any waste be e, which tends to the destruction of the inheritance; one t-tenant may have an action of waste against the other, construction of the statute Westm. 2. c. 22. (t). So too. igh at common law no action of account lay for one jointnt against another, unless he had constituted him his iff or receiver (u), yet now by the statute 4 Ann. c. 16. t-tenants may have actions of account against each other, receiving more than their due share of the profits of the ments held in joint-tenancy.

kom the same principle also arises the remaining grand dent of joint estates; viz. the doctrine of survivorship: which, when two or more persons are seised of a joint to of inheritance, for their own lives, or pur auter vie, rejointly possessed of any chattel interest, the entire tecy upon the decease of any of them remains to the survi
, and at length to the last survivor; and he shall be end to the whole estate, whatever it be, whether an inherite or a common freehold only, or even a less estate (w).

sis the natural and regular consequence of the union and rety of their interest. The interest of two joint-tenants

Co. Litt. 185. (r) 3 Leon. 262. (s) 1 Leon. 234. (t) 2
403. (u) Co. Litt. 200. (w) Litt. §. 280. 281.

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is not only equal or fimilar, but also is one and the fe One has not originally a diffinct moiety from the others if by any subsequent act (as by alienation or forfeith either) the interest becomes separate and distinct, the in tenancy instantly ceases. But, while it continues, ear two joint-tenants has a concurrent interest in the whole; therefore, on the death of his companion, the fole interest the whole remains to the furvivor. For the interest, w the furvivor originally had, is clearly not develted by death of his companion; and no other person can now d to have a joint estate with him, for no one can now have interest in the whole, accruing by the same title, and a effect at the fame time with his own; neither can any claim a feparate interest in any part of the tenements: that would be to deprive the furvivor of the right which has in all, and every part. As therefore the furvivor's nal interest in the whole still remains; and as no one can be admitted, either jointly or feverally, to any share him therein; it follows, that his own interest must no entire and several, and that he shall alone be entitled to whole estate (whatever it be) that was created by the ori grant.

This right of survivorship is called by our antient and (x) the jus accrescendi, because the right, upon the dearence joint-tenant, accumulates and increases to the survivor, as they themselves express it, "pars illa communior, as they themselves, de persona in personam, usque at much superstitem." And this jus accrescendi ought to mutual; which I apprehend to be the reason why not the king (y), nor any corporation (z), can be a joint to with a private person. For here is no mutuality: the person has not even the remotest chance of being sell the entirety, by benefit of survivorship, for the king an corporation can never die.

⁽x) Bracton l. 4. tr. 3. c. 9. §. 3. Fleta. l. 3. c. 4. Litt. 190. Finch. L. 83. (2) 2 Lev. 12.

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But a device of one's fant We are, laftly, to enquire, how an estate in joint-tecy may be fewered and destroyed. And this may be done teltroying any of its constituent unities. 1. That of time. th respects only the original commencement of the joint t, cannot indeed (being now past) be affected by any equent transactions. But, 2. The joint-tenant's estate be destroyed, without any alienation, by merely difunittheir possession. For joint-tenants being feifed per my et tout, every thing that tends to narrow that interest, fo they shall not be feifed throughout the whole, and ughout every part, is a feverance or destruction of the ture. And therefore, if two joint-tenants agree to part lands, and hold them in feveralty, they are no longer tenants; for they have now no joint interest in the le, but only a feveral interest respectively in the several s. And, for that reason also, the right of survivorship is uch separation destroyed (a). By common law affithe tenants might agree to make partition of the lands, But of them could not compel the others fo to do (b): for, being an estate originally created by the act and agreetof the parties, the law would not permit any one or of them to destroy the united possession without a siminiverfal confent (c). But now by the statutes 31 Hen. c. 1. and 32 Hen. VIH. c. 32 joint-tenants, either of itances or other lefs offates, are compellable by writ of tion to divide the lands. 13. The jointure may be deed, by destroying the unity of title. As if one joint-tealienes and conveys his estate to a third person: here the tenancy is severed, and turned into tenancy in com-(d); for the grantee and the remaining joint-tenant hold ferent titles, (one derived from the original, the other the fubfequent grantor) though till partition made, the DL. II. unity

Co. Litt. 188. 193. (b) Litt. § 290. (c) Thus, by vil law, nemo invitus compellitur aa communionem (Ef. 12.6. 4) And again: si non omnes qui rem communem babent, sed ex bis, dividere desiderant; hoc judicium enter eos accipi po(Ff. 10. 3. 8.)

(d) Litt. §. 292.

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unity of possession continues. But a devise of one's share will is no severance of the jointure : for no testament takes fect till after the death of the testator, and by such death right of the furvivor (which accrued at the original creation the estate, and has therefore a priority to the other) (e) is ready vested (f). 4. It may also be destroyed, by destroy the unity of interest. And therefore, if there be two join tenants for life, and the inheritance is purchased by or scends upon either, it is a severance of the jointure (g): thou if an estate is originally limited to two for life, and after the heirs of one of them, the freehold shall remain in joints without merging in the inheritance; because, being cra by one and the same conveyance, they are not separateela (which is requisite in order to a merger) but branches of entire estate (h). In like manner, if a joint-tenant in makes a leafe for life of his share, this defeats the jointure for it destroys the unity both of title and of interest. A whenever or by whatever means the jointure ceases or is vered, the right of furvivorship or jus accrescendi the same stant ceases with it (k). Yet, if one of three joint-ten alienes his share, the two remaining tenants still hold to parts by joint-tenancy and furvivorship (1): and, if on three joint-tenants releases his share to one of his companie though the joint-tenancy is destroyed with regard to that yet the two remaining parts are still held in jointure (m); they still preserve their original constituent unities. when, by an act or event, different interests are create the feveral parts of the estate, or they are held by different tles, or if merely the possession is separated; so that the nants have no longer these four indispensible propertie sameness of interest, an undivided possession, a title velte one and the fame time, and by one and the fame act orga the jointure is instantly dissolved.

⁽e) Jus accrescendi praesertur ultimae voluntati. Co. Litt. (f) Litt. §. 287. (g) Cro. Eliz. 470. (h) 2 Re Co. Litt. 182. (i) Litt. §. 302, 303. (k) Nibili accrescit ei, qui nibil in re quando jus accresceret habet. Co. 188. (l) Litt. §. 294. (m) Ibid. §. 304.

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general it is advantageous for the joint-tenants to difthe jointure; fince thereby the right of survivorship is naway, and each may transmit his own part to his own Sometimes however it is difadvantageous to diffolve the effate: as if there be joint-tenants for life, and they epartition, this dissolves the jointure; and, though bethey each of them had an estate in the whole for their lives and the life of their companion, now they have an in a moiety only for their own lives merely; and, on eath of either, the reversioner shall enter on his moin). And, therefore, if there be two joint-tenants ife, and one grants away his part for the life of his comm, it is a forfeiture (o): for, in the first place, by the ance of the jointure he has given himself in his own ty only an estate for his own life; and then he grants the land for the life of another; which grant by a tenant s own life merely, is a forfeiture of his estate (p); for creating an estate which may by possibility last longer that which he is legally entitled to.

An estate held in coparcenary is where lands of inhetedescend from the ancestor to two or more persons. It either by common law, or particular custom. By comaw: as where a person seised in see-simple or in seeies, and his next heirs are two or more semales, his ters, sisters, aunts, cousins, or other representatives; case they shall all inherit, as will be more sully shewn, we treat of the descents hereafter: and these co-heirs and called coparceners; or, for brevity, parceners only sarceners by particular custom are where lands descend, gavelkind, to all the males in equal degree, as sons, as, uncles, &c. (r). And, in either of these cases, all receners put together make but one heir; and have but ate among them (s).

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Jones. 55. (o) 4 Leon. 237. (p) Co. Litt. 252. itt. §. 241, 242. (r) Ibid. §. 265. (s) Co. Litt.

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THE properties of parceners are in some respects like the of joint-tenants; they having the fame unities of interest, in and poffession. They may fue and be fued jointly for man relating to their own lands (t): and the entry of one of the shall in some cases enure as the entry of them all (u). The cannot have an action of trespass against each other; herein they differ from joint-tenants, that they are also cluded from maintaining an action of waste (w); for com ceners could at all times put a stop to any waste by a win partition, but till the statute of Henry the eighth joint nants had no fuch power. Parceners also differ materia from joint-tenants in four other points: 1. They alway claim by descent, whereas joint-tenants always claim by Therefore if two fifters purchase lands, to hold them and their heirs, they are not parceners, but joint nants (x): and hence it likewise follows, that no lands be held in coparcenary, but estates of inheritance, which of a descendible nature; whereas not only estates in see in tail, but for life or years, may be held in joint-tenan 2. There is no unity of time necessary to an estate in con cenary. For if a man hath two daughters, to whom his d descends in coparcenary, and one dies before the other; furviving daughter and the heir of the other, or, when b are dead, their two heirs, are still parceners (y); the eff vesting in each of them at different times, though it be fame quantity of interest, and held by the same title. 3.1 ceners, though they have a unity, have not an entirety, of terest. They are properly entitled each to the wholed distinct moiety (z); and of course there is no jus accresa or survivorship between them: for each part descends to rally to their respective heirs, though the unity of possel continues. And as long as the lands continue in a count descent, and united in possession, so long are the ten thereof, whether male or female, called parceners. Be the possession be once severed by partition, they are no los

⁽t) Co. Litt. 164. (u) Ibid. 188. 243. (w) 2 Infl. (x) Litt. §. 254. (y) Co. Litt. 164. 174. (z) Ibid. 164.

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ceners, but tenants in feveralty; or if one parcener alis her share, though no partion be made, then are the ds no longer held in coparcenary, but in common (a).

PARCENERS are so called, saith Littleton (b), because they y be constrained to make partition. And he mentions many thods of making it (c); four of which are by consent, and by compulsion. The first is, where they agree to divide lands into equal parts in severalty, and that each shall e such a determinate part. The second is, when they ee to chuse some friend to make partition for them, and n the sisters shall chuse each of them her part according to iority of age; or otherwise, as shall be agreed. The prige of seniority is in this case personal; for if the eldest or be dead, her issue shall not chuse sirst, but the next sisters

But, if an advowson descend in coparcenary, and the irs cannot agree in the presentation, the eldest and her is, nay her husband, or her assigns, shall present alone, bethe younger (d). And the reason given is that the former silege, of priority in choice upon a division, arises from an of her own, the agreement to make partition; and there is merely personal: the latter, of presenting to the livarises from the act of the law, and is annexed not only see person, but to her estate also. A third method of parmis, where the eldest divides, and then she shall chuse; for the rule of law is, cujus est divisio, alterius est esec-

The fourth method is where the sisters agree to cast lots their shares. And these are the methods by consent. at by compulsion is, where one or more sue out a writ of tition against the others; whereupon the sherisf shall go the lands, and make partition thereof by the verdict of a y there impanelled, and assign to each of the parceners her tin severalty (e). But there are some things which are

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a) Litt. §. 309. (b) §. 241. (c) §. 243. to 264. (d) Litt. 166. 3 Rep. 22. (e) By statute 8 & 9 W. III. c. n easier method of carrying on the proceedings on a writ of paron, of lands held either in joint-tenancy, parcenary, or comp, than was used at the common law, is chaiked out and provided.

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in their nature impartible. The mansion-house, commo estovers, common of piscary uncertain, or any other com without stint, shall not be divided; but the eldest sister, i pleases, shall have them, and make the others a reason satisfaction in other parts of the inheritance: or, if that not be, then they shall have the profits of the thing by to in the same manner as they take the advowson (f).

THERE is yet another confideration attending the effa coparcenary; that if one of the daughters has had an e given with her in frankmarriage by her ancestor (which may remember was a species of estates-tail, freely given relation for advancement of his kinfwoman in marriage) this case, if lands descend from the same ancestor to her her fifters in fee-fimple, the or her heirs shall have thare of them, unless they will agree to divide the land given in frankmarriage in equal proportion with the re the lands descending (h). This mode of division was kn in the law of the Lombards (i); which directs the woma preferred in marriage, and claiming her share of the in tance, mittere in confusum cum sororibus, quantum aut frater ei dederit, quando ambulaverit ad maritum. V us it is denominated bringing those lands into hotchpot which term I shall explain in the very words of Littleton " it feemeth that this word, hotchpot, is in English, a "ding; for in a pudding is not commonly put one thinga " but one thing with the other things together." By housewifely metaphor our ancestors meant to inform us that the lands, both those given in frankmarriage and descending in fee-simple, should be mixed and blended to ther, and then divided in equal portions among all theda ters. But this was left to the choice of the donee in fra marriage; and if the should not chuse to put her lands in ho pot, the was prefumed to be fufficiently provided for, and

⁽f) Co. Litt. 164, 165. (g) See pag. 115. (h) Brackle 2. c. 34. Litt. §. 2660 273. (i) l. 2. t. 14. c. 15. Britton. c. 72. (!) § 267. (m) Litt. §. 268.

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of the inheritance was divided among her other fifters. elaw of hotchpot took place then only, when the other ds descending from the ancestor were fee-simple; for, if descended in tail, the donce in frankmarriage was entito her share, without bringing her lands so given into chpot (n). And the reason is, because lands descending in simple are distributed by the policy of law, for the mainance of all the daughters; and, if one has a sufficient proon out of the same inheritance, equal to the rest, it is not fonable that the should have more: but lands, descending tail, are not distributed by the operation of law, but by the ignation of the giver, per formam doni; it matters not refore how unequal this distribution may be. Also no ds, but fuch as are given in frankmarriage, shall be brought photchpot; for no others are looked upon in law as given the advancement of the woman, or by way of marriagetion (o). And therefore, as gifts in frankmarriage are falinto difuse, I should hardly have mentioned the law of thpot, had not this method of division been received and jed by the statute for distribution of personal estates, which shall hereafter consider at large.

THE estate in coparcenary may be dissolved, either by paron, which disunites the possession; by alienation of one mener, which disunites the title, and may disunite the inest; or by the whole at last descending to and vesting in single person, which brings it to an estate in severalty.

W. TENANTS in common are such as hold by several and institutes, but by unity of possession; because none know-his own severalty, and therefore they shall occupy pro-scuously (p). This tenancy therefore happens, where re is an unity of possession merely, but perhaps an entire mion of interest, of title, and of time. For, if there be tenants in common of lands, one may hold his part in simple, the other in tail, or for life; so that there is no necessary

⁽a) Litt- §. 274. (o) Ibid. 275. (p) Ibid. 292.

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necessary unity of interest: one may hold by descent, to other by purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title: one estate may have been vested fifty years, the other's but ye terday; for there is no unity of time. The only unity the is, is that of possessing and for this Littleton gives the treason, because no man can certainly tell which part is own: otherwise even this would be soon destroyed.

TENANCY in common may be created, either by the Aruction of the two other estates, in joint-tenancy and cop cenary, or by special limitation in a deed. By the defin tion of the two other estates, I mean such destruction as de not fever the unity of possession, but only the unity of title interest. As, if one of two joint-tenants in fee alienes estate for the life of the alience, the alience and the other join tenant are tenants in common: for they now have feve titles, the other joint-tenant by the original grant, the alie by the new alienation (q); and they also have several in refts, the former joint-tenant in fee-simple, the alience his own life only. So, if one joint-tenant gives his parte in tail, and the other gives his to B in tail, the dones tenants in common, as holding by different titles and conv ances (r). If one of two parceners alienes, the alienee and remaining parcener are tenants in common (s); because t hold by different titles, the parcener by descent, the alie by purchase. So likewise, if there be a grant to two men, two women, and the heirs of their bodies, here the grant shall be joint-tenants, of the life-estate, but they shall h feveral inheritances; because they cannot possibly have heir of their two bodies, as might have been the case had limitation been to a man and woman, and the heirs of their dies begotten (t): and in this, and the like cases, their fues shall be tenants in common; because they must de by different titles, one as heir of A, and the other as heir of

⁽⁹⁾ Litt. §. 293. (1) Ibid. 295. (4) Ibid. 309. (1) Ibid. 28

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nd those too not titles by purchase, but descent. In short, henever an estate in joint-tenancy or coparcenary is dissolved, that there be no partition made, but the unity of possession ontinues, it is turned into a tenancy in common.

ATENANCY in common may also be created by express liitation in a deed: but here care must be taken not to insert ords which imply a joint estate; and then if lands be given to o or more, and it be not joint-tenancy, it must be a tenancy common. But the law is apt in its constructions to favour int-tenancy rather than tenancy in common (u); because the visible services issuing from land (as rent, &c.) are not dividde l, nor the entire services (as fealty) multiplied, by joint-tethe mey, as they must necessarily be upon a tenancy in common. and given to two, to be holden the one moiety to one, and the her moiety to the other, is an estate in common (w); and, on one grants to another half his land, the grantor and grantee eve ealfo tenants in common (x): because, as has been before (y) served, joint-tenants do not take by distinct halves or moies; and by fuch grants the division and severalty of the estate to plainly expressed, that it is impossible they should take a ntinterest in the whole of the tenements. But a devise to opersons, to hold jointly and severally, is a joint-tenancy; cause that is implied in the word " jointly," even though word " severally" seems to imply the direct reverse (z): dan estate given to A and B, equally to be divided between m, tho' in deeds it hath been faid to be a joint-tenancy (a), ritimplies no more than the law has annexed to that estate, z. divisibility) (b), yet in wills it is certainly a tenancy in nmon (c); because the devisor may be presumed to have ant what is most beneficial to both the devisees, tho' his aning is imperfectly expressed. And this nicety in the iding of grants makes it the most usual as well as the safest

u) Salk. 392. (w) Litt. S. 298. (x) Ibid. 290. (2) Poph. 52. (a) 1 Equ. Caf. abr. See pag. 182. (b) 1 P. Wms. 17. (c) 3 Rep. 39. 1 Ventr. 32.

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way, when a tenancy in common is meant to be created, add express words of exclusion as well as description, and mit the estate to A and B, to hold as tenants in common, a not as joint-tenants.

As to the incidents attending a tenancy in common: tenan in common (like joint-tenants) are compellable by the flatus of Henry VIII. and William III. before-mentioned (d). make partition of their lands; which they were not at comm law. They properly take by distinct moieties, and have not tirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents are such as mere arise from the unity of possession; and are therefore the far as appertain to joint-tenants merely upon that account: fo as being liable to reciprocal actions of wafte, and of account by the statutes of Westm. 2. c. 22. and 4 Ann. c. 16. For the common law no tenant in common was liable to account his companion for embezzling the profits of the effate (though, if one actually turns the other out of possession, action of ejectment will lie against him (f). But, as forot incidents of joint-tenants, which arise from the privity of the or the union and entirety of interest (such as joining or be joined in actions (g), unless in the case where some intire indivisible thing is to be recovered) (h), these are not appli ble to tenants in common, whose interests are distinct, whose titles are not joint but several.

ESTATES in common can only be diffelved two ways:
By uniting all the titles and interests in one tenant, by purch
or otherwise; which brings the whole to one severalty: 2.
making partition between the several tenants in comm
which give them all respective severalties. For indeed ten
cies in common differ in nothing from sole estates, but me
in the blending and unity of possession. And this sinishes
enquiries with respect to the nature of estates.

CHAPT

⁽d) Pag. 185, & 189. (e) Co. Litt. 199. (f) Bid. 1 (g) Litt. § 311. (b) Co. Litt. 197.

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CHAPTER THE THIRTEENTH.

OF THE TITLE TO THINGS REAL, IN GENERAL.

THE foregoing chapters having been principally employed in defining the nature of things real, in describing etenures by which they may be holden, and in distinguishing eseveral kinds of estate or interest that may be had therein, tome now to consider, lastly, the title to things real, with emanner of acquiring and losing it. A title is thus defined for Edward Coke (a), titulus est justa causa possidendi id and nostrum est; or, it is the means whereby the owner of ads hath the just possession of his property.

THERE are several stages or degrees requisite to form a mplete title to lands and tenements. We will consider them a progressive order.

I. The lowest and most imperfect degree of title consists in a mere naked possession, or actual occupation of the estate; ithout any apparent right, or any snadow or pretence of right, hold and continue such possession. This may happen, when a man invades the possession of another, and by force or surfice turns him out of the occupation of his lands; which is smed a dissession, being a deprivation of that actual seisin, or corporal

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corporal freehold of the lands, which the tenant before en joyed. Or it may happen, that after the death of the ancellor and before the entry of the heir, or after the death of a part. cular tenant and before the entry of him in remainder or revefion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here fuggested, the wrong doer has only a mere naked possession, which the rights owner may put an end to, by a variety of legal remedies, a will more fully appear in the third book of these commentaria, But in the mean time, till some act be done by the rightful owner to devest this possession and affert his title, such actual possession is, prima facie, evidence of a legal title in the pos fessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and inde feasible title. And, at all events, without such actual polici fion no title can be completely good.

II. The next step to a good and perfect title is the right poffession, which may refide in one man, while the actual poffe fion is either in himself or in another. For if a man bedi feised, or otherwise kept out of possession, by any of the mean before-mentioned, though the actual possession be lost, yet has still remaining in him the right of possession; and ma exert it whenever he thinks proper, by entering upon thedi feifor, and turning him out of that occupancy which he has illegally gained. But this right of possession is of two sorts an apparent right of possession, which may be defeated proving a better; and an actual right of possession, which will stand the test against all opponents. Thus if the differsor, other wrongdoer, dies possessed of the land whereof he so he came feifed by his own unlawful act, and the same descends his heir; now by the common law the heir hath obtained apparent right, though the actual right of possession relides the person diffeised; and it shall not be lawful for the person diffeiled to devest this apparent right by mere entry or other act of his own, but only by an action at law (b). For, un

⁽b) Litt. §. 385.

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e contrary be proved by legal demonstration, the law will ther prefume the right to refide in the heir, whose ancestor ied feised, than in one who has no such presumptive evidence urge in his own behalf. Which doctrine in some measure ofe from the principles of the feodal law, which, after feuds ecame hereditary, much favoured the right of descent; in rder that there might be a person always on the spot to perorm the feodal duties and fervices (c) : and therefore, when a udatory died in battle, or otherwise, it presumed always that s children were entitled to the feud, till the right was otherife determined by his fellow-foldiers and fellow-tenants, the ers of the feodal court. But if he, who has the actual ght of possession, puts in his claim and brings his action ithin a reasonable time, and can prove by what unlawful eans the ancestor became seised, he will then by sentence of w recover that possession, to which he hath such actual ght. Yet, if he omits to bring this his possessory action ithin a competent time, his adversary may imperceptibly in an actual right of possession, in consequence of the other's gligence. And by this, and certain other means, the party pt out of possession may have nothing left in him, but what e are next to speak of; viz.

III. THE mere right of property, the jus proprietatis, withnt either possession or even the right of possession. This is
equently spoken of in our books under the name of the mere
ght, jus merum; and the estate of the owner is in such cases
id to be totally devested, and put to a right (d). A person
this situation may have the true ultimate property of the
nds in himself: but by the intervention of certain circummees, either by his own negligence, the solemn act of his
cestor, or the determination of a court of justice, the premptive evidence of that right is strongly in favour of his
tagonist; who has thereby obtained the absolute right of
selssion. As, in the first place, if a person disserted, or
med out of possession of his estate, neglects to pursue his
medy within the time limited by law: by this means the

⁽c) Gilb. Ten. 18.

⁽d) Co. Litt. 345.

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diffeifor or his heirs gain the actual right of possession: for the law prefumes that either he had a good right originally, in virtue of which he entered on the lands in question, or the fince fuch his entry he has procured a fufficient title; and therefore, after fo long an acquiescence, the law will not fuffer his possession to be disturbed without enquiring into the able lute right of property. Yet still, if the person diffeised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right; but, b proving fuch his better right, he may at length recover the lands. Again; if a tenant in tail discontinues his estate-tail by alienating the lands to a stranger in fee, and dies; hereth iffue in tail hath no right of poffession, independent of the right of property: for the law prefumes prima facie that the an cestor would not disinherit, or attempt to disinherit, his hei unless he had power so to do; and therefore, as the ancello had in himself the right of possession, and has transferred fame to a stranger, the law will not permit that possession no to be disturbed, unless by shewing the absolute right of pr perty to refide in another person. The heir therefore in case has only a mere right, and must be strictly held to proof of it, in order to recover the lands. Lastly, if by an dent, neglect, or otherwise, judgment is given for either par in any possessory action, (that is, such wherein the right possession only, and not that of property, is contested) the other party hath indeed in himself the right of propert this is now turned to a mere right; and upon proof there in a subsequent action, denominated a writ of right, he h recover his feifin of the lands.

Thus, if a disseisor turns me out of possession of mylan he thereby gains a mere naked possession, and I still retain right of possession, and right of property. If the disseisor d and the lands descend to his son, the son gains an apparently of possession; but I still retain the actual right both of possession and property. If I acquiesce for thirty years, with bringing any action to recover possession of the lands, the

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ains the actual right of possession, and I retain nothing but ne mere right of property. And even this right of property ill fail, or at least it will be without a remedy, unless I urfue it within the space of fixty years. So also if the faer be tenant in tail, and alienes the estate-tail to a stranger fee, the alience thereby gains the right of possession, and e fon hath only the mere right or right of property. nd hence it will follow, that one man may have the poffefn, another the right of poffession, and a third the right of operty. For if tenant in tail enfeoffs A in fee-simple, d dies, and B diffeifes A; now B will have the possession. the right of possession, and the issue in tail the right of prorty: A may recover the possession against B; and afwards the iffue in tail may evict A, and unite in himself e possession, the right of possession, and also the right of operty. In which union confifts,

IV. A COMPLETE title to lands, tenements, and herediments. For it is an antient maxim of the law (e), that no le is completely good, unless the right of possession be joined the the right of property; which right is then denomited a double right, jus duplicatum, or droit droit (f). In the denominated when to this double right the actual possession is also ited, when there is, according to the expression of Fleta, juris et seisnae conjunctio, then, and then only, is the le completely legal.

⁽f) Co. Litt. 266. Bract. l. 5. tr. 3.
(g) l. 3. c. 15. § 5.

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CHAPTER THE FOURTEENTH.

OF TITLE BY DESCENT.

In has a hairge neileston out ter some than it at HE feveral gradations and stages, requisite to form L complete title to lands, tenements, and hereditamen having been briefly stated in the preceding chapter, we next to confider the feveral manners, in which this compl title (and therein principally the right of propriety) be reciprocally loft and acquired: whereby the dominion things real is either continued, or transferred from one in to another. And here we must first of all observe, that gain and loss are terms of relation, and of a reciprocal ture) by whatever method one man gains an estate, by fame method or its correlative fome other man has lot As where the heir acquires by descent, the ancestor has loft or abandoned the estate by his death; where the gains land by escheat, the estate of the tenant is first of loft by the natural or legal extinction of all his hered blood: where a man gains an interest by occupancy, thes mer owner has previously relinquished his right of possessing where one man claims by prescription or immemorial us another man has either parted with his right by an anti and now forgotten grant, or has forfeited it by the sup ness or neglect of himself and his ancestors for ages: fo, in case of forfeiture, the tenant by his own misbels our or neglect has renounced his interest in the estate; whe upon it devolves to that person who by law may takeads tage of fuch default: and, in alienation by commona rances, the two confiderations of loss and acquisition ar

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erwoven, and so, constantly contemplated together, that never hear of a conveyance, without at once receiving the ea as well of the grantor as the grantee.

THE methods therefore of acquiring on the one hand, and losing on the other, a title to estates in things real, are reced by our law to two: descent, where the title is vested a man by the fingle operation of law; and purchase, ere the title is vested in him by his own act or agreent (a).

DESCENT, or hereditary succession, is the title whereby representation, as his heir at law. An heir therefore is upon whom the law casts the estate immediately on the west of the ancestor: and an estate of the law casts the estate immediately on the mpler, is in law called the inheritance.

THE doctrine of descents, or law of inheritances in feeple, is a point of the highest importance; and is indeed principal object of the laws of real property in England. the rules relating to purchases, whereby the legal course descents is broken and altered, perpetually refer to this led law of inheritance, as a datum or first principle unifally known, and upon which their fubsequent limitations to work. Thus a gift in tail, or to a man and the heirs his body, is a limitation that cannot be perfectly underd without a previous knowlege of the law of descents in simple. One may well perceive, that this is an estate fined in its descent to such heirs only of the donce, as forung or shall spring from his body; but who those sare, whether all his children both male and female, or male only, and (among the males) whether the eldeft, ngest, or other son alone, or all the sons together, shall his heir; this is a point, that we must result back to the ding law of descents in see-simple to be informed of.

tern endired to tellers, that

In order therefore to treat a matter of this universal m quence the more clearly, I shall endeavour to lay afide ! matters as will only tend to breed embarasiment and co fion, in our enquiries, and shall confine myself entire this one object. I shall therefore decline considering at fent who are, and who are not, capable of being heirs ferving that for the chapter of escheats. I shall also passe the frequent division of descents, in those by custom, san and common law: for descents by particular custom, as to the fons in gavelkind, and to the youngest in boroughglish, have already been often (b) hinted at, and may be incidentally touched upon again; but will not make a parate confideration by themselves, in a system so gen as the present: and descents by statute, or fees-tail per mam doni, in pursuance of the statute of Westminster the cond, have also been already (c) copiously handled; has been feen that the descent in tail is restrained and n lated according to the words of the original donation, and not intirely pursue the common law doctrine of inherita which, and which only, it will now be our bufiness to expla

AND, as this depends not a little on the nature of kind and the several degrees of confanguinity, it will be proufly necessary to state, as briefly as possible, the true not of this kindred or alliance in blood (d).

CONSANGUINITY, or kindred, is defined by the mon these subjects to be "vinculum personarum ab roum" pite descendentium;" the connexion or relation of pur descended from the same stock or common ancestor. consanguinity is either lineal, or collateral.

(b) See Vol. I pag. 74, 75. Vol. II. pag. 83. 85. (c) pag. 112, &c. (d) For a fuller explanation of the dolling confanguinity, and the confequences refulting from a right when find the nature, see an essay on collateral confanguing the fift volume of law tracts, Oxon. 1762. 8vo.

Tritavi Table of CONSANGUINIT 9 VIII itavi IX Pater 8 X Tritavia IX Atavus VI Abavus VIII XII Avus V 3 Pater XIII PROPO

23 loli ive ger . 14.

INEAL confanguinity is that which subsists between perse, of whom one is descended in a direct line from the other: between John Stiles (the propositus in the table of confanity) and his father, grandfather, great-grandfather, and so wards in the direct ascending line; or between John Stiles this son, grandson, great-grandson, and so downwards in direct descending line. Every generation, in this lineal est confanguinity, constitutes a different degree, reckonceither upwards or downwards: the father of John Stiles elated to him in the first degree, and so likewise is his son; grandsire and grandson in the second; his great grandand great grandson in the third. This is the only ural way of reckoning the degrees in the direct line, and refore universally obtains, as well in the civil (e), and

on (f), as in the common law (g).

HE doctrine of lineal confanguinity is fufficiently plain and ious; but it is at the first view astonishing to consider the ber of lineal ancestors which every man has, within no great number of degrees: and fo many different bloods is a man faid to contain in his veins as he hath lineal anors. Of those he hath two in the first ascending degree, own parents; he hath four in the second, the parents of father, and the parents of his mother; he hath eight in the d, the parents of his two grandfathers and two grandmos; and, by the fame rule of progression, he hath an hunand twenty eight in the feventh; a thousand and twenty in the tenth; and at the twentieth degree, or the distance wenty generations, every man hath above a million of stors, as common arithmetic will demonstrate (i). This al confanguinity, we may observe, falls strictly within the nition of vinculum personarum ab eodem stipite descendentium;

⁾ Ff. 38. 10. 10. (f) Decretal. 1. 4. tit. 14. (g) Co.
23. (h) Ibid. 12. (i) This will feem surprizing
of who are unacquainted with the encreasing power of proive numbers; but is palpably evident from the following table
geometrical progression, in which the first term is 2, and the
denominator

tium; fince lineal relations are fuch as descend one from other, and both of course from the same common ancest

COLLATERAL kindred answers to the same description collateral relations agreeing with the lineal in this, that they seem from the same stock or ancestor; but differing in this, they do not descend from each other. Collateral kinsmen such then as lineally spring from one and the same ancestor, wis the stirps, or root, the stipes, trunk, or common stock, for whence these relations are branched out. As if John Stiles h

denominator also 2: or, to speak more intelligibly, it is evid for that each of us has two ancestors in the first degree; number of whom is doubled at every remove, because each of ancestors has also two immediate ancestors of his own.

Lineal Degrees.	Number of Ancestors
1	2
2	18
3	16
4	32
5	
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	
18:	26.144
19	5242.88
20	1048576

A shorter method of sinding the number of ancestors at any degree is by squaring the number of ancestors at half that most degrees. Thus 16 (he number of ancestors at four degrees is the square of 4, the number of ancestors at two; 256 is square of 16; 65536 of 256; and the number of ancestors degrees would be the square of 1048576, or upwards of lion millions.

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o sons, who have each a numerous issue; both these issues sineally descended from John Stiles as their common ances; and they are collateral kinsmen to each other, because y are all descended from this common ancestor, and all rea portion of his blood in their veins, which denomines them consanguineos.

We must be careful to remember, that the very being of colal confanguinity confifts in this descent from one and the e common ancestor. Thus Titius and his brother are red; why? because both are derived from one father: Titius his first cousin are related; why? because both descended nthe fame grandfather: and his fecond coufin's claim to fanguinity is this, that they both are derived from one and fame great-grandfather. In short, as many ancestors as a has, so many common stocks he has, from which collatekinsmen may be derived. And as we are taught by holy , that there is one couple of ancestors belonging to us all, whom the whole race of mankind is descended, the obviand undeniable confequence is, that all men are in some rerelated to each other. For indeed, if we only suppose couple of our ancestors to have left, one with another, children; and each of those children on an average to have two more; (and, without fuch a supposition, the human es must be daily diminishing) we shall find that all of us now fubfifting near two hundred and feventy millions of red in the fifteenth degree, at the same distance from the al common ancestors as ourselves are; besides those that one or two descents nearer to or farther from the comflock, who may amount to as many more (k). And, if calculation should appear incompatible with the number habitants on the earth, it is because, by intermarriages ig the several descendants from the same ancestor, a hunorathousand modes of consanguinity may be consolidated ne person, or he may be related to us a hundred or a fand different ways.

This will swell more considerably than the former calcu; for here, though the first term is but 1, the denominator
; that is, there is one kinsman (a brother) in the first dewho makes, together with the propositus, the two descendants

THE method of computing these degrees in the canon law which our law has adopted (m), is as follows. We begin at common ancestor, and reckon downwards; and in whatsoey degree the two persons, or the most remote of them, is diffa

dants from the first couple of anceftors; and in every other gree the number of kindred must be the quadruple of those in degree which immediately precedes it. For, fince each couple ancestors has two descendants, who encrease in a duplicate ratio will follow that the ratio, in which all the descendants encre downwards, must be double to that in which the ancestors encre upwards; but we have feen that the ancestors encrease in a plicate ratio: therefore the descendants must encrease in a don duplicate, that is, in a quadruple ratio.

Collateral Degree. Number of Kindred.

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This calculation may also be formed by a more compendious cefs, viz. by fquaring the couples, or half the number, of an tors at any given degree; which will furnish us with the num of kindred we have in the same degree, at equal distance with selves from the common stock, besides those at unequal distant Thus, in the tenth lineal degree, the number of ancestors is 10 its half, or the couples, amount to 512; the number of kindre the tenth collateral degree amounts therefore to 262144, or square of 512. And if we will be at the trouble to recolled state of the several families within our own knowledge, and ferve how far they agree with this account; that is, whether an average, every man has not one brother or fifter, four coulins, fixteen fecond coulins, and so on; we shall find that prefent calculation is very far from being overcharged.

(m) Co, Litt. 23. (1) Decretal. 4. 14. 3 6 9.

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n the common ancestor, that is the degree in which they related to each other. Thus Titius and his brother are ted in the first degree; for from the father to each of them ounted only one: Titius and his nephew are related in the and degree; for the nephew is two degrees removed from commom ancestor; viz. his own grandfather, the father of u. Or, (to give a more illustrious instance from our Engannals) king Henry the seventh, who slew Richard the din the battle of Bosworth, was related to that prince in fifth degree. Let the propositus therefore in the table of anguinity represent king Richard the third, and the class ked (E) king Henry the seventh. Now their common stock ncestor was king Edward the third, the abavus in the same from him to Edmond Duke of York, the proavus, is one te; to Richard earl of Cambridge, the avus, two; to Richluke of York, the pater, three; to king Richard the third. repositus, four: and from king Edward the third to John ant(A) is one degree; to John earl of Somerset (B) two: hn duke of Somerset (c) three; to Margaret countess of mond (D) four: to king Henry the seventh (E) five. ch last mentioned prince, being the farthest removed from ommon stock, gives the denomination to the degree of ed in the canon and municipal law. Though according computation of the civilians, (who count upwards, from of the persons related, to the common stock, and then wards again to the other; reckoning a degree for each both ascending and descending) these two princes were d in the ninth degree : for from Richard the third to rdduke of York is one degree; to Richard earl of Camthe third, the common ancestor, four; to John of Gant, to John earl of Somerset, fix; to John duke of Somerset, to Margaret countess of Richmond, eight; to king the seventh, nine (n).

See the table of confanguinity annexed; wherein all the de-of collateral kindred to the propositus are computed, so far tenth of the civilians and the seventh of the canonists incluthe former being distinguished by the numeral letters, the of the common ciphers.

THE nature and degrees of kindred being thus in a measure explained, I shall next proceed to lay down a se of rules, or canons of inheritance, according to which tates are transmitted from the angestor to the heir; toge with an explanatory comment, remarking their original progress, the reasons upon which they are founded, and some cases their agreement with the laws of other nation

I. THE first rule is, that inheritances shall lineally deso to the issue of the person last actually seised, in infinite but shall never lineally ascend.

To explain the more clearly, both this and the fubleq rules, it must first be observed, that by law no inherit can vest, nor can any person be the actual complete he another, till the ancestor is previously dead. Nemo est ha viventis. Before that time the person who is next in line of fuccession is called an heir apparent, or heir presu tive. Heirs apparent are fuch, whose right of inheritan indefeafible, provided they outlive the ancestor; as the fon or his iffue, who must by the course of the common be heirs to the father whenever he happens to die. Heirs fumptive are fuch, who, if the ancestor should die imm ately, would in the present circumstances of things behish but whose right of inheritance may be defeated by the tingency of some nearer heir being born: as a brother nephew, whose presumptive succession may be destroyed the birth of a child; or daughter, whose present may be hereafter cut off by the birth of a fon. Nay, et the estate hath descended, by the death of the owner, to brother, or nephew, or daughter; in the former call estate shall be devested and taken away by the birth of a humous child; and, in the latter, it shall also be to devested by the birth of a posthumous fon (o).

(o) Bro. tit. descent. 58.

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WE must also remember, that no person can be properly ch an ancestor, as that an inheritance in lands or tenements be derived from him, unless he hath had actual seisin of hlands, either by his own entry, or by the possession of own or his ancestor's lessee for years, or by receiving rent ma leffee of the freehold (p): or unless he hath had what equivalent to corporal feifin in hereditaments that are inporeal; fuch as the receipt of rent, a presentation to the urch in case of an advowson (q), and the like. But he Ill not be accounted an ancestor, who hath only a bare ht or title to enter or be otherwise seised. And therefore the cases, which will be mentioned in the present chapter, upon the supposition that the deceased (whose inheritance now claimed) was the last person actually seised thereof. the law requires this notoriety of possession, as evidence the ancestor had that property in himself, which is now be transmitted to his heir. Which notoriety hath succeedin the place of the antient feodal investiture, whereby, ile feuds were precarious, the vafal on the descent of lands s formerly admitted in the lord's court (as is still the pracin Scotland) and there received his feifin, in the nature a renewal of his ancestors grant, in the presence of the dal peers: till at length, when the right of fuccession ame indefeafible, an entry on any part of the lands withthe county (which if disputed was afterwards to be tried those peers) or other notorious possession, was admitted equivalent to the formal grant of seisin, and made the ant capable of transmitting his estate by descent. The in therefore of any person, thus understood, makes him root or stock, from which all future inheritance by right blood must be derived: which is very briefly expressed his maxim, seisina facit stipitem (r). OL. II.

or. II. When the start of Kabanan to node 300 WHEN

(1) Litt § 3. (t) Solden de frecef. 28. 12. 1: Nev. 11. (27. (a) Ind. 5. Pad. I. v. 1. 13. § (5. Locks pr. 26.) 1

e) Co. Litt. 15 (q) Ibid. 11. (r) Flet, 1. 6. c. 2. §. 2.

WHEN therefore a person dies so seised, the inherit first goes to his issue: as if there be Geossiey, John, Matthew, grandfather, father, and son; and John chases land and dies; his son Matthew shall succeed his heir, and not the grandfather Geossiey; to whom the shall never ascend, but shall rather escheat to the lord (s

THIS rule, fo far as it is affirmative and relates to li descents, is almost universally adopted by all nations; it seems founded on a principle of natural reason, that (w ever a right of property transmissible to representative admitted) the possessions of the parents should go, upon decease, in the first place to their children, as those whom they have given being, and for whom they are the fore bound to provide. But the negative branch, or exclusion of parents and all lineal ancestors from succeed to the inheritance of their offspring, is peculiar to our laws, and fuch as have been deduced from the fame of nal. For, by the Jewish law, on failure of issue the fa fucceeded to the fon, in exclusion of brethren, unless of them married the widow and raifed up feed to his bro (t). And, by the laws of Rome, in the first place the dren or lineal descendants were preferred; and, on fa of these, the father and mother or lineal ascendants such ed together with the brethren and fifters (v); though b law of the twelve tables the mother was originally, or count of her fex, excluded (u). Hence this rule of our has been cenfured and declaimed against, as abfurd an rogating from the maxims of equity and natural justice Yet that there is nothing unjust or absurd in it, but on the contrary it is founded upon very good reason, appear from confidering as well the nature of the rule as the occasion of introducing it into our laws.

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2 Feud. 31. c. 33.

⁽s) Litt. §. 3. (t) Selden. de success. Ebracor. c. 12. (38. 15. 1. Nov. 118, 127. (u) Inst. 3. 3. 1. (w) Crag. d feud. l. 2. t. 13. §. 15. Locke on gov. part. 1. §. 90.

The are to reflect, in the first place, that all rules of such to estates are creatures of the civil polity, and juris is merely. The right of property, which is gained by fancy, extends naturally no farther than the life of the at possession; after which the land by the law of nature dagain become common, and liable to be seised by the occupant: but society, to prevent the mischiefs that tensue from a doctrine so productive of contention, tablished conveyances, wills, and successions; whereby roperty originally gained by possession is continued, and mitted from one man to another, according to the rules reach state has respectively thought proper to prescribe. It is certainly therefore no injustice done to individuals, were be the path of descent marked out by the munici-

we next confider the time and occasion of introducing ule into our law, we shall find it to have been groun con very substantial reasons. I think there is no doubt made, but that it was introduced at the same time and in consequence of, the feodal tenures. For it m express rule of the feodal law (x), that successionis talis est natura, quod ascendentes non succedunt; and ore the same maxim obtains also in the French law to ay(y). Our Henry the first indeed, among other restos of the old Saxon laws, restored the right of succession ascending line (z): but this soon fell again into disuse; early as Glanvil's time, who wrote under Henry the we find it laid down as established law (a), that baenunquam ascendit; which has remained an invariable never fince. These circumstances evidently shew this be of feodal original; and, taken in that light, are some arguments in its favour, besides those which rawn merely from the reason of the thing. For if the of which the fon died feised, was really feudum K 2 antiquum,

¹ Feud. 50. (y) Domat. p. 2. l. 2. t. 2. Montesqu. Esp. 31.c. 33. (2) LL. Hen. I. c. 70. (a) l. 7. c. 1.

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passed him in the course of descent, before it could a the fon ; unless it were feudum maternum, or one de from his mother, and then for other reasons (while appear hereafter) the father could in no wife inheriting if it were feudum novum, or one newly acquired by then only the descendants from the body of the fee himself could succeed, by the known maxim of the feodal constitutions (b); which was founded as we the personal merit of the vasal, which might be tran to his children but could not afcend to his progenit also upon this consideration of military policy, that crepit grandfire of a vigorous vafal would be but indiff qualified to fucceed him in his feodal fervices. Na if this feudum novum were held by the fon ut feudu quum, or with all the qualities annexed of a feud de as if it had been really an antient feud; and therefor not go to the father, because, if it had been an antier the father must have been dead before it could ha Thus whether the feud was strictly now strictly antiquum, or whether it was novum held ut a in none of these cases the father could possibly succeed reasons, drawn from the history of the rule itself, be more fatisfactory than that quaint one of Brad adopted by fir Edward Coke (d), which regula descent of lands according to the laws of gravitation

II. A SECOND general rule or canon is, that the fue shall be admitted before the female.

⁽c) Descendit itaque jus, quasi p (b) 1 Feud. 20. quid, cadens deor sum recta linea, et nunquam reascent 29. (d) 1 Inft. 11.

ale lawgivers have somewhat uncomplaisantly expressed eworthiest of blood shall be preferred (e). As if John hath two sons, Matthew and Gilbert, and two daugh-Margaret and Charlotte, and dies; first Matthew, in case of his death without issue) then Gilbert, shall mitted to the succession in preference to both the daugh-

us preference of males to females is entirely agreeable law of fuccession among the Jews (f), and also among tes of Greece, or at least among the Athenians (g); astotally unknown to the laws of Rome (h), (fuch of I mean, as are at prefent extant) wherein brethen and were allowed to fucceed to equal portions of the inhee. I shall not here enter into the comparative merit of oman and the other constitutions in this particular, nor ne into the greater dignity of blood in the male or fefex; but shall only observe, that our present prefeof males or females feems to have arisen entirely from odal law. For though our British ancestors, the Welsh, to have given a preference to males (i), yet our fubat Danish predecessors seem to have made no distinction es, but to have admitted all the children at once to the tance (k). But the feodal law of the Saxons on the ent (which was probably brought over hither, and tered by the law of king Canute) gives an evident ence of the male to the female sex. " Pater aut mater, meti, filio non filiae haereditatem relinquent. Qui metus non filios sed filias relinquerit, ad eas omnis haeilas pertineat (1)." It is possible therefore that this ence might be a branch of that imperfect system of which obtained here before the conquest; especially K 3

Hal. H. C. L. 235. (f) Numb. c. 27. (g) Petit. LL. l. 6 t. 6. (h) Inst. 3. 1. 6. (i) Stat. Wall. 12 Edw. I. L. Canut. c 68. (l) tit. 7. §. 1 & 4.

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as it subsists among the customs of gavelkind, and as, charter or laws of king Henry the first, it is not (like Norman innovations) given up, but rather enforced The true reason of preferring the males must be deduced feodal principles: for, by the genuine and original poli that constitution, no female could ever succeed to a p feud (n), inafmuch as they were incapable of perfor those military services, for the sake of which that system But our laws do not extend to a total excl of females, as the Salic law, and others, where feuds most strictly retained: it only postpones them to males though daughters are excluded by fons, yet they fuccee fore any collateral relations : our law, like that of the feudifts before-mentioned, thus steering a middle course tween the absolute rejection of females, and the putting on a footing with males.

III. A THIRD rule, or canon of descent, is this; where there are two or more males in equal degree, the only shall inherit; but the semales all together.

As if a man hith two sons, Matthew and Gilbert, and daughters, Margaret and Charlotte, and dies; Matthe eldest son shall alone succeed to his estate, in exclusion of bert the second son and both the daughters: but, if both sons die without issue before the father, the daughters garet and Charlotte shall both inherit the estate as conners (0).

This right of primogeniture in males feems antien have only obtained among the Jews, in whose constitute eldest son had a double portion of the inheritance (p the same manner as with us, by the laws of king Hen first (q), the eldest son had the capital fee or principal se

⁽m) c. 70. (n) 1 Feud. 8. (o) Litt. §. 5. Hale, H. C. I (p) Selden, de fucc. Ebr. c. 5. (q) c. 70.

sfather's possessions, and no other pre-eminence; and as eldest daughter had afterwards the principal mansion, hen the estate descended in coparcenary (r). The Greeks, Romans, the Britons, the Saxons, and even originally feudifts, divided the lands equally; fome among the chilen at large, some among the males only. This is certainly most obvious and natural way; and has the appearance, least in the opinion of younger brothers, of the greatest partiality and justice. But when the emperors began to atchonorary feuds, or titles of nobility, it was found nefary (in order to preserve their dignity) to make them imrible (s), or (as they styled them) feuda individua, and in nsequence descendible to the eldest son alone. This exple was farther enforced by the inconveniences that atded the splitting of estates; namely, the division of the litary fervices, the multitude of infant tenants incapable of forming any duty, the confequential weakening of the ngth of the kingdom, and the inducing younger fons to eup with the business and idleness of a country life, inad of being ferviceable to themselves and the public, by enging in mercantile, in military, in civil, or in ecclefiaftiemployments (t). These reasons occasioned an almost al change in the method of feodal inheritances abroad; that the eldest male began universally to succeed to the ole of the lands in all military tenures: and in this conion the feodal constitution was established in England by illiam the conqueror.

YET we find, that socage estates frequently descended to the sons equally, so lately as when Glanvil (u) wrote, in reign of Henry the second; and it is mentioned in the mor(w) as a part of our antient constitution, that knights's should descend to the eldest son, and socage fees should partible among the male children. However in Henry the rd's time we find by Bracton (x) that socage lands, in imi-

t) Glanvil. 1. 7. c. 3. (s) 2 Feud. 55. (t) Hale. H. C. L. (u) 1. 7. c. 3. (w) c. 1. §. 3. (x) 1. 2. c. 30, 31.

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tation of lands in thivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stand except in Kent, where they gloried in the preservation their gavelkind tenure, of which a principal branch was a joint inheritance of all the sons (y); and except in some particular manors and townships, where their local customs to tinued the descent, sometimes to all, sometimes to the youn est son only, or in other more singular methods of succession

As to the females, they are still left as they were by antient law: for they were all equally incapable of perfor ing any personal service; and therefore, one main reason preferring the eldest ceasing, such preference would ha been injurious to the reft : and the other principal purpo the prevention of the too minute subdivision of estates, left to be confidered and provided for by the lords, whole the disposal of these female heirestes in marriage. However the fuccession by primogeniture, even among females, to place as to the inheritance of the crown (2); wherein the cessity of a sole and determinate succession is as great in one fex as the other. And the right of fole fuccession, thou not of primogeniture, was also established with respect female dignities and titles of honour. For if a man holds earldom to him and the heirs of his body, and dies, leav only daughters; the eldest shall not of course be count but the dignity is in suspense or abeyance till the king s declare his pleasure; for he, being the fountain of hono may confer it on which of them he pleases (a). disposition is preserved a strong trace of the antient law feuds, before their descent by primogeniture even am the males was established; namely, that the lord m bestow them on which of the sons he thought proper:--" progressum est, ut ad filios deveniret, in quem scilicet de " nus boc wellet beneficium confirmare (b). IV. A FOUR

⁽y) Somner. Gavelk. 7. (z) Co. Litt. 165. (a) Ibid. Foud. 1.

IV. A FOURTH rule, or canon of descents, is this; that sineal descendants, in infinitum, of any person deceased if represent their ancestor; that is, shall stand in the same ce as the person himself would have done, had he been ing.

Thus the child, grandchild, or great-grandchild (either lear female) of the eldest son succeeds before the younger, and so in infinitum (c). And these representatives shall eneither more nor less, but just so much as their princiswould have done. As if there be two sisters, Margaret Charlotte; and Margaret dies, leaving six daughters; then John Stiles the father of the two sisters dies, without er issue: these six daughters shall take among them exty the same as their mother Margaret would have done, she been living; that is, a moiety of the lands of John es in coparcenary: so that, upon partition made, if the libe divided into twelve parts, thereof Charlotte the suring sister shall have six, and her six nieces, the daughters shargaret, one apiece.

HIS taking by representation is called a succession in firaccording to the roots; fince all the branches inherit the thare that their root, whom they represent, would have e. And in this manner also was the Jewish succession died (d); but the Roman somewhat differed from it. In descending line the right of representation continued in utum; and the inheritance still descended in stirpes: as nof three daughters died, leaving ten children, and then father died; the two furviving daughters had each one of his effects, and the ten grandchildren had the remainthird divided between them. And so among collaterals, if person of equal degree with the persons represented were subsisting, (as if the deceased left one brother, and nephews the fons of another brother) the fuccession was guided by the roots: but, if both the breth en were dead ing iffue, then (I apprehend) their representatives in K 5

[|] Hale, H. C. L. 236, 237. (d) Selden. de fucc. Ebr. c. 1.

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equal degree became themselves principals, and shared the inheritance per capita, that is, share and share alike; the being themselves row the next in degree to the ancestor, their own right, and not by right of representation (e). It is the next heirs of Titius be six nieces, three by one six two by another, and one by a third; his inheritance by the Roman law was divided into six parts, and one given to a of the nieces: whereas the law of England in this case wou still divide it only into three parts, and distribute it per six thus; one third to the three children who represent the second, a the remaining third to the one child who is the sole representative of her mother.

This mode of representation is a necessary consequence the double preference given by our law, first to the male fue, and next to the firstborn among the males, to both whi the Roman law is a stranger. For if all the children of the fifters were in England to claim, per capita, in their rights as next of kin to the ancestor, without any respect the stocks from whence they sprung, and those children w partly male and partly female; then the eldest male amo them would exclude not only his own brethren and fifters, all the iffue of the other two daughters; or elfe the law this instance must be inconsistent with itself, and depart for the preference which it constantly gives to the males, and first born, among persons in equal degree. Whereas, by viding the inheritance according to the roots or flirpes, rule of descent is kept uniform and steady: the iffue of eldest son excludes all other pretenders, as the son himself living) would have done; but the iffue of two daughters vide the inheritance between them, provided their mothers living) would have done the fame: and amongst these seve issues, or representatives of the respective roots, the sa preference to males and the same right of primogeniture tain, as would have obtained at the first among the ro themselves, the sons or daughters of the deceased. As

an hath two fons, A and B, and A dies leaving two fons, nd then the grandfather dies; now the eldest son of A shall acceed to the whole of his grandfather's estate: and if A had ft only two daughters, they should have succeeded also to qual moities of the whole, in exclusion of B and his issue. utifaman hath only three daughters, C D, and E; and C ies leaving two fons, D leaving two daughters, and E leavg a daughter and a fon who is younger than his fifter: here, hen the grandfather dies, the eldest son of C shall succeed one third, in exclusion of the younger; the two daughters of to another third in partnership; and the son of E to the remining third, in exclusion of his elder fifter. And the same ight of representation, guided and restrained by the same ules of descent, prevails downwards in infinitum.

YET this right does not appear to have been thoroughly tablished in the time of Henry the second, when Glanvil rote; and therefore, in the title to the crown especially, we nd frequent contests between the younger (but furviving) other, and his nephew (being the fon and representative of he eldest deceased) in regard to the inheritance of their comion ancestor: for the uncle is certainly nearer of kin to the ommon stock, by one degree, than the nephew; though he nephew, by reprefenting his father, has in him the right f primogeniture. The uncle also was usually better able to erform the services of the fief; and besides had frequently uperior interest and strength, to back his pretensions and with the right of his nephew. And even to this day, in the ower Saxony, proximity of blood takes place of representawe primogeniture; that is, the younger furviving brother admitted to the inheritance before the son of an elder detaled; which occasioned the dispute between the two houses Mecklenburg, Schwerin and Strelitz, in 1692 (f). Yet lanvil, with us, even in the twelfth century, feems (g) to tclare for the right of the nephew by representation; proided the eldest son had not received a provision in lands from his with all to had minimize with his

Little after besteved be of the blood of that is li (f) Mod. Un. hift. xlii. 334.

⁽g) 1. 7. c. 3.

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his father, (or as the civil law would call it) had not bee forisfamiliated, in his life-time. King John, however, where his nephew Arthur from the throne, by disputing the right of representation, did all in his power to abolish throughout the realm (h): but in the time of his son, king Henry the third, we find the rule indisputably settled in the manner we have here laid it down (i), and so it has continue ever since. And thus much for lineal descents.

V. A FIFTH rule is, that, on failure of lineal descendant or issue, of the person last seited, the inheritance shall descend to the blood of the first purchasor; subject to the three preceding rules.

Thus if Geoffrey Stiles purchases land, and it descends John Stiles his son, and John dies seised thereof withoutissue; whoever succeeds to this inheritance must be of the blood of Geoffrey the first purchasor of this family (k). The first purchasor, perquisitor, is he who first acquired the esta to his family, whether the same was transferred to him to sale, or by gift, or by any other method, except only the of descent.

This is a rule almost peculiar to our own laws, and the of a similar original. For it was entirely unknown amon the Jews, Greeks, and Romans: none of whose laws look any farther than the person himself who died seised of the estate; but assigned him an heir, without considering him what title he gained it, or from what ancestor he derived it. But the law of Normandy (1) agrees with our law in this spect: nor indeed is that agreement to be wondered at, sin the law of descents in both is of feodal original; and the rule or canon cannot otherwise be accounted for than by a curring to feodal principles.

WHEN feuds first began to be hereditary, it was made necessary qualification of the heir, who would succeed to feud, that he should be of the blood of, that is lineally d

⁽h) Hale H. C. L. 217. 229. (i) Bracton. l. 2. c. 30. (k) Co. Litt. 12. (1) Gr. Coustum. c. 25.

Ch. 14.

tended from, the first feudatory or purchasor. In conseuence whereof, if a vafal died possessed of a feud of his own quiring, or feudum no vum, it could not descend to any but is own offspring; no, not even to his brother, because he as not descended, nor derived his blood, from the first acuirer. But if it was feudum antiquum, that is, one deended to the vafal from his ancestors, then his brother, or th other collateral relation as was descended and derived his lood from the first feudotary, might succeed to such inherince. To this purpose speaks the following rule; " frater fratri fine legitimo baerede defuncto, in beneficio quod eorum patris fuit, succedat : sin autem unus e fratribus a domino feudum acceperit, eo defuncto fine legitimo baerede. frater ejus in feudum non succedit (m)." The true feodal ason for which rule was this; that what was given to a man. rhis personal service and personal merit, ought not to deend to any but the heirs of his person. And therefore, as estates-tail, (which a proper feud very much resembled) so the feodal donation, " nomen baeredis, in prima investitura expressium, tantum ad descendentes ex corpore primi vasalli expenditur; et non ad collaterales, nisi ex corpore primi vafalli five flipitis descendant (n):" the will of the donor, or iginal lord, (when feuds were turned from life estates into heritances) not being to make them absolutely hereditary, e the Roman allodium, but hereditary only fub modo; not reditary to the collateral relations, or lineal ancestors, or band, or wife of the feudatory, but to the iffue descended om his body only.

HOWEVER, in process of time, when the feodal rigor was part abated, a method was invented to let in the collateral ations of the grantee to the inheritance, by granting him a dum novum to hold ut feudum antiquum; that is, with all qualities annexed of a feud derived from his ancestors; then the collateral relations were admitted to fucceed even infinitum, because they might have been of the blood of, at is descended from, the first imaginary purchasor. For

conded from the factor of this. Course 81:

fince it is not afcertained in fuch general grants, whether feud shall be held ut feudum paternum, or feudum avitum, ut feudum antiquum merely as a feud of indefinite antiquity that is, fince it is not ascertained from which of the ancello of the grantee this feud shall be supposed to have descended the law will not afcertain it, but will suppose any of his a ceftors, pro re nata, to have been the first purchasor: a therefore it admits any of his collateral kindred (who ha the other necessary requisites) to the inheritance, because ever collateral kinfman must be descended from some one of lineal ancestors.

OF this nature are all the grants of fee-simple estates of the kingdom; for there is now in the law of England no in thing as a grant of a feudum novum, to be held ut novum unless in the case of a fee-tail, and there we see that this n is strictly observed, and none but the lineal descendants of first donee (or purchasor) are admitted: but every grant lands in fee-simple is with us a feudum novum to be held antiquum, as a feud whose antiquity is indefinite; and the fore the collateral kindred of the grantee, or descendants for any of his lineal ancestors, by whom the lands might ha possibly been purchased, are capable of being called to the heritance.

YET, when an estate hath really descended in a course inheritance to the person last seised, the strict rule of the fe dal law is still observed; and none are admitted, but the he of those through whom the inheritance hath passed: for others have demonstrably none of the blood of the first p chasor, in them, and therefore shall never succeed. As lands come to John Stiles by descent from his mother L Baker, no relation of his father (as fuch) shall ever be his of these lands; and, vice verfa, if they descended from father Geoffrey Stiles, no relation of his mother (as in shall ever be admitted thereto; for his father's kindred none of his mother's blood, nor have his mother's related any share of his father's blood. And so, if the estate scended from his father's father, George Stiles; the relati

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(o) Doma discent. 2 f his father's mother, Cecilia Kempe, shall for the same eason never be admitted, but only those of his father's faher. This is also the rule of the French law (0), which is erived from the same feodal fountain.

HERE we may observe, that so far as the feud is really anquum, the law traces it back, and will not fuffer any to inerit but the blood of those ancestors, from whom the feud as conveyed to the late proprietor. But when, through ngth of time, it can trace it no farther; as if it be not nown whether his grandfather, George Stiles, inherited it om his father Walter Stiles, or his mother Christian Smith; if it appear that his grandfather was the first grantee, and took it (by the general law) as a feud of indefinite antiqui-: in either of these cases the law admits the descendants of ny ancestor of George Stiles, either paternal or maternal, be in their due order the heirs to John Stiles of this estate : ecause in the first case it is really uncertain, and in the seand case it is supposed to be uncertain, whether the grandther derived his title from the part of his father or his other.

This then is the great and general principle, upon which to law of collateral inheritances depends; that upon failure iffue in the last proprietor, the estate shall descend to the lood of the first purchasor; or, that it shall result back to to the heirs of the body of that ancestor, from whom it either ally has, or is supposed by siction of law to have, originally escended: according to the rule laid down in the year looks (p), Fitzherbert (q), Brook (r), and Hale (s); "that he who would have been heir to the father of the deceased" and, of course, to the mother, or any other purchasing antestor) "shall also be heir to the son."

THE remaining rules are only rules of evidence, calculated investigate who that purchasing ancestor was; which, in feudis

⁽o) Domat. part 2. pr. (p) M. 12. Edw. W. 14. (q) Abr. discent, 2. (r) Ibid. 38. (s) H. C. L. 243.

feudis vere antiquis, has in process of time been forgotten, and is supposed so to be in feuds that are held ut antiquis.

VI. A SIXTH rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.

FIRST, he must be his next collateral kinsman, either perfonally or jure representationis; which proximity is reckened according to the canonical degrees of confanguinity beforementioned. Therefore, the brother being in the first degree. he and his descendants shall exclude the uncle and his issue, who is only in the fecond. And herein confifts the true reason of the different methods of computing the degrees of confanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards confanguinity principally with respect to successions, and therein very naturally confiders only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great-nephew but also his first-cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards confanguinity principally with a view to prevent inceffucus marriages, between those who have a large portion of the same blood running in their respective veins; and therefore look up to the author of their blood, or the common ancestor reckoning the degrees from him: fo that the great-nepher is related in the third canonical degree to the person proposed and the first-cousin in the second; the former being distant three degrees from the common ancestor; and therefore de riving only one fourth of his blood from the same fountain with the propositus; the latter, and also the propositus, ten each of them distant only two degrees from the common an ceftor, and therefore having one half of each of their blood the fame. The common law regards confanguinity princi pally with respect to descent; and, having therein the sam

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bject in view as the civil, it may feem as if it ought to proed according to the civil computation. But as it also refests the purchasing ancestor, from whom the estate was dewed, it therein resembles the canon law, and therefore counts sdegrees in the fame manner. Indeed the defignation of erion (in feeking for the next of kin) will come to exactly he same end (though the degrees will be differently numered) whichever method of computation we suppose the law England to use; fince the right of representation (of the ther by the fon, &c.) is allowed to preval in infinitum. his allowance was absolutely necessary, else there would are frequently been many claimants in exactly the fame deme of kindred, as (for instance) uncles and nephews of the eccased; which multiplicity, though no inconvenience in eRoman law of partible inheritances, yet would have been reductive of endless confusion where the right of sole successia, as with us, is established. The issue or descendants thereor of John Stiles's brother are all of them in the first degree fkindred with respect to inheritances, as their father also. hen living, was; those of his uncle in the second, and so n, and are feverally called to the fuccession in right of such heir representative proximity.

The right of representation being thus established, the forterpart of the present rule amounts to this; that, on failure
fissive of the person last seised, the inheritance shall detend to the issue of his next immediate ancestor. Thus if
some stiles dies without issue, his estate shall descend to Franthis brother, who is lineally descended from Geossfrey Stiles
is next immediate ancestor, or father. On failure of breten, or sisters, and their issue, it shall descend to the uncle
spon stiles, the lineal descendant of his grandsather George,
and so on in infinitum. Very similar to which was the law of
theritance among the antient Germans, our progenitors:
theredes successore sque sui cuique liberi, et nullum testamentum:
the liberi non sunt, proximus gradus in possessione, fratres,
strui, avunculi (t)."

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⁽t) Tacitus de mer. Germ. 21.

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Now here it must be observed, that the lineal ancestors though (according to the first rule) incapable themselves o fucceeding to the estate, because it is supposed to have alread passed them, are yet the common stocks from which the nex fucceffor must spring. And therefore in the Jewish law which in this respect entirely corresponds with ours (u), th father or other lineal ancestor is himself said to be the heir though long fince dead, as being represented by the persons his issue; who are held to succeed not in their own rights, brethren, uncles, &c. but in right of representation, as the offspring of the father, grandfather, &c. of the deceased (v But, though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to name him making out the pedigree or descent. For the descent betwee two brothers is held to be an immediate descent; and then fore title may be made by one brother or his representative to or through another, without mentioning their common f ther (w). If Geoffrey Stiles hath two fons, John and Fra cis, Francis may claim as heir to John, without namis their father Geoffrey: and so the son of Francis may claim as coufin and heir to Matthew the son of John, without nan ing the grandfather; viz. as son of Francis, who was t brother of John, who was the father of Matthew. But thou the common ancestors are not named in deducing the pedigre yet the law still respects them as the fountains of inherital blood: and therefore in order to ascertain the collateral hi of John Stiles, it is in the first place necessary to recur to ancestors in the first degree; and if they have left any oth issue besides John, that issue will be his heir. On default fuch, we must ascend one step higher to the ancestors in t fecond degree, and then to those in the third, and four and so upwards, in infinitum; till some ancestors be foun who have other iffue descending from them besides the ceased, in a parallel or collateral line. From these and tors the heir of John Stiles must derive his descent; and fuch derivation the fame rules must be observed, with rega

⁽u) Numb. c 27. (v) Selden, de succ. Ebr. c. 12. (w) Sid. 193. 1 Lev. 60. 12 M d. 619.

to fex, primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor.

But, secondly, the heir need not be the nearest kinsman absolutely, but only fub modo; that is, he must be the nearest kinsman of the subole blood; for, if there be a much nearer kinsman of the balf blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded.

A KINSMAN of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of anceftors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath (fo far as the diffance of degrees will permit) all the fame ingredients in the composition of his blood that the other hath. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or, he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a fecond husband, Lewis Gay, and hath iffue by him; the blood of this iffue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay (instead of Geoffrey Stiles) on the other part, it hath therefore only half the same ingredients with that of John Stiles: so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two bethren are not brethren of the whole blood, and therefore shall never inhent to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldelt fon A, who enters thereon, and dies feised without iffue; fill B shall not be heir to this estate, because he is only of the half blood to A, the person last seised; but, had A died without

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without entry, then B might have inherited; not as heir to A his half-brother, but as heir to their common father, who was the person last actually seised (x).

THIS total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule; which is not so much to be confidered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most univerfal principle of collateral inheritances being this, that an heir to a feudum antiquam must be of the blood of the first feudatory or purchasor, that is, derived in a lineal descent from him; it was originally requifite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first done or purchasor, and to shew that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchafor, and thereby the proof of an actual descent from him became impossible; then the law substituted what fir Martin Wright (y) calls a reasonable, in the stead of an impossible, proof: for it remits the proof of an actual descent from the first purchasor; and only requires, in lieu of it, that the claimant be next of the whole blood to the per on last in posfession; (or derived from the same couple of ancestors) which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchasor. For he who is my kinsman of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are vice versa his: he therefore is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half blood has but one half of his ancestors above the common stock the same as mine; and therefore there is not the fam

(x) Hale H. C. L. 238.

(y) Tenures. 186.

fame probability of that standing requisite in the law, that he be derived from the blood of the first purchasor.

To illustrate this by example. Let there be John Stiles, and Francis, brothers by the same father and mother, and another fon of the fame mother by Lewis Gay a fecond husband. Now, if John dies seised of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole blood, is qualified to be his heir; for he is fure to be in the line of descent from the first purchasor, whether it were the line of the father or the mother. But if Francis should die before John, without issue, the mother's fon by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his descent from the first purchasor, who is unknown, nor has he that fair probability which the law admits as prefumptive evidence, fince he is to the full as likely not to be descended from the line of the first purchasor, as to be descended; and therefore the inheritance shall go to the nearest relation possessed of this prefumptive proof, the whole blood.

AND, as this is the case in feudis antiquis, where there reallydid once exist a purchasing ancestor, who is forgotten; it is also the case in feudis novis held ut antiquis, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in feesimple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchasor (and not his own offspring only) may inherit them, provided they be of the whole blood; for all fuch are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded for want of the same probability. Nor should this be thought hard, that a brother of the purchasor, though only of the half blood, must thus be difinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law; since it

is only upon a like supposition and fiction, that brethren or purchasors (whether of the whole or half blood) are entitled to inherit at all: for we have feen that in feudis firicle novin neither brethren nor any other collaterals were admitted. As therefore in feudis antiquis we have feen the reasonableness of excluding the half blood, if by a fiction of law a feudum novum be made descendible to collaterals as if it was feudum antiquum it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

PERHAPS by this time the exclusion of the half blood does not appear altogether so unreasonable, as at first fight it is an to do. It is certainly a very fine-spun and subtile nicety: but confidering the principles upon which our law is founded, i is not an injustice, nor always a hardship; since even the fuccession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals : and, though that indulgence is not extended to the demi-kindred, yet the are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchasor, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not neither can any other method, answer this purpose entirely For though all the ancestors of John Stiles, above the common flock, are also the ancestors of his collateral kinsman of the whole blood; yet, unless that common stock be in the first de gree, (that is, unless they have the same father and mother there will be intermediate ancestors below the common stock that may belong to either of them respectively, from which the other is not descended, and therefore can have none their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors, than what ar in common to them both; yet with regard to his uncle, when the common stock is removed one degree higher, (that is, th

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andfather and grandmother) one half of John's ancestors will of be the ancestors of his uncle : his patruus, or father's other, derives not his descent from John's maternal ancestors; this avunculus, or mother's brother, from those in the pamal line. Here then the fupply of proof is deficient, and no means amounts to a certainty: and, the higher the mmon flock is removed, the more will even the probability crease. But it must be observed, that (upon the same princis of calculation) the half blood have always a much less ance to be descended from an unknown indefinite ancestor the deceased, than the whole blood in the same degree. As. the first degree, the whole brother of John Stiles is sure to descended from that unknown ancestor; his half brother sonly an even chance, for half John's ancestors are not his. in the fecond degree, John's uncle of the whole blood has even chance; but the chances are three to one against his de of the half blood, for three fourths of John's ancestors not his. In like manner, in the third degree, the chances only three to one against John's great uncle of the whole od, but they are feven to one against his great uncle of the If blood, for feven eighths of John's ancestors have no contion in blood with him. Therefore the much less probabiof the half blood's descent from the first purchasor, comred with that of the whole blood, in the feveral degrees, has assoned a general exclusion of the half blood in all.

But, while I thus illustrate the reason of excluding the Isblood in general, I must be impartial enough to own, that, some instances, the practice is carried farther than the prinche upon which it goes will warrant. Particularly, when a siman of the whole blood in a remoter degree, as the uncle or that uncle, is preferred to one of the half blood in a nearer gree, as the brother: for the half-brother hath the same successful descended from the purchasing ancestor, as the de; and a thrice better chance than the great uncle, or kinsmin the third degree. It is also more especially overstrained, the same has two sons by different venters, and the estate on

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his death descends to him from the eldest, who enters, and without iffue; in which case the younger son cannot inhe this estate, because he is not of the whole blood to the last or prietor. This, it must be owned, carries a hardship with even upon feodal principles: for the rule was introduced or to supply the proof of a descent from the first purchasor; here, as this estate notoriously descended from the father, as both the brothers confessedly sprung from him, it is demo strable that the half brother must be of the blood of the purchafor, who was either the father or fome of the father's cestors. When therefore there is actual demonstration of thing to be proved, it is hard to exclude a man by a rule fi stituted to supply that proof when deficient. So far as inheritance can be evidently traced back, there feems no n of calling in this presumptive proof, this rule of probabi to investigate what is already certain. Had the elder brot indeed been a purchasor, there would have been no hardhi all, for the reasons already given: or had the frater uten only, or brother by the mother's fide, been excluded from inheritance which descended from the father, it had been hig reasonable.

INDEED it is this very instance, of excluding a frater. fanguineus, or brother by the father's fide, from an in ritance which descended a patre, that Craig (z) has sing out, on which to ground his strictures on the English of half blood. And, really, it should feem, as if the cu of excluding the half blood in Normandy (a) extended to exclude a frater uterinus, when the inheritance descent a patre, and vice versa: and possibly in England as even with us it remained a doubt, in the time of B ton (b), and of Fleta (c), whether the half blood on father's fide were excluded from the inheritance which ginally descended from the common father, or only from as descended from the respective mothers, and from a purchased lands. And the rule of law, as laid down by Forte

⁽b) 1. (z) l. 2. t. 15. §. 14. (a) Gr. Coustum. c. 25. 30. §. 3. (c) 1. 6. c. 1. §. 14.

ortescue (d), extends no farther than this; frater fratri utenon fuccedet in haereditate paterna. It is moreover worthy observation, that by our law, as it now stands, the crown which is the highest inheritance in the nation) may descend the half blood of the preceding fovereign (e), fo as it be the lood of the first monarch, purchasor or (in the feodal lanuage) conqueror, of the reigning family. Thus it actually descend from king Edward the fixth to queen Mary, and om her to queen Elizabeth, who were respectively of the half od to each other. For, the royal pedigree being always a atter of fufficient notoriety, there is no occasion to call in the iof this prefumptive rule of evidence, to render probable the feent from the royal stock; which was formerly king Wilmthe Norman, and is now (by act of parliament) (f) the incess Sophia of Hanover. Hence also it is, that in estates-I, where the pedigree from the first donee must be strictly oved, half blood is no impediment to the descent (g): beufe, when the lineage is clearly made out, there is no need this auxiliary proof. How far it might be defirable for the illature to give relief, by amending the law of descents in eortwo instances, and ordaining that the half blood might ways inherit, where the estate notoriously descended from its aproper ancestor, and, in cases of new-purchased lands or certain descents, should never be excluded by the whole od in a remoter degree: or how far a private inconvenience ould be submitted to, rather than a long established rule ould be shaken, it is not for me to determine.

THE rule then, together with its illustration, amounts to so that, in order to keep the estate of John Stiles as nearly as sible in the line of his purchasing ancestor, it must descend the issue of the nearest couple of ancestors that have left demants behind them; because the descendants of one anter only are not so likely to be in the line of that purchast ancestor, as those who descended from two.

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d) De laud. LL. Angl. 5.
12 Will, III. c. 2.

⁽e) Plowd. 245. Co. Litt. 15.

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But here another difficulty arises. In the second, thin fourth, and every fuperior degree, every man has many coup of ancestors, increasing according to the distances in a geom trical progression upwards (h), the descendants of all which spective couples are (representatively) related to him int fame degree. Thus in the fecond degree, the iffue of Geor and Cecilia Stiles, and of Andrew and Efther Baker, thet grandsires and grandmothers of John Stiles, are each in fame degree of propinquity, in the third degree, the respect iffues of Walter and Christian Stiles, of Luke and France Kempe, of Herbert and Hannah Baker, and of James a Emma Thorpe, are (upon the extinction of the two infer degrees) all equally entitled to call themselves the next ki dred of the whole blood to John Stiles. To which therefor of these ancestors must we first resort, in order to find out scendants to be preferably called to the inheritance? In fwer to this, and to avoid the confusion and uncertain that might arise between the several stocks, wherein the pu chasing ancestor may be fought for,

VII. THE seventh and last rule or canon is, that in colteral inheritances the male stocks shall be preferred to female; (that is, kindred derived from the blood of the mancestors shall be admitted before those from the blood the female) unless where the lands have, in fact, descent from a female.

Thus the relations on the father's fide are admitted in in nitum, before those on the mother's fide are admitted at all and the relations of the father's father, before those of the ther's mother; and so on. And in this the English laws singular, but warranted by the examples of the Hebrews Athenian laws, as stated by Selden (k) and Petit (l); the among the Greeks, in the time of Hesiod (m), when a died without wife or children, all his kindred (without distinction)

⁽h) See pag. 204. (i) Litt. § 4. (k) De face. Ebra c. 12. (l) LL. Attic. l. 1. t, 6. (m) @sqyst. 606.

diffinction) divided his estate among them. It is likewise warranted by the examples of the Roman laws; wherein the agnati, or relations by the father, were preferred to the agnati, or relations by the mother, till the edict of the emperor Justinian (n) abolished all distinction between them. It is also conformable to the customary law of Normandy (0), which indeed in most respects agrees with our English law of inheritance.

HOWEVER, I am inclined to think, that this rule of our law loes not owe its immediate original to any view of conformity othose which I have just now mentioned; but was established norder to effectuate and carry into execution the fifth rule or anon before laid down; that every heir must be of the blood f the first purchasor. For, when such first purchasor was not afily to be discovered, after a long course of descents, the lawers not only endeavoured to investigate him, by taking the extrelation of the whole blood to the person last in possession: utalfo, confidering that a preference had been given to males by virtue of the fecond canon) through the whole course of lieal descent from the first purchasor to the present time, they udged it more likely that the lands should have descended to he last tenant from his male than from his female ancestors; fom the father (for instance) rather than from the mother: rom the father's father, rather than the father's mother: nd therefore they hunted back the inheritance (if I may be flowed the expression) through the male line, and gave it the next relations on the fide of the father, the father's fater, and fo upwards; imagining with reason that this was me most probable way of continuing it in the line of the first urchasor. A conduct much more rational than the pretrence of the agnati by the Roman laws: which, as they ave no advantage to the males in the first instance or direct neal succession, had no reason for preferring them in the ansverse collateral one; upon which account this preference as very wifely abolished by Justinian.

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⁽n) Nov. 118.

⁽o) Gr. Couftom. c. 25.

THAT this was the true foundation of the preference of the agnati or male stocks, in our law, will farther appear, if confider, that, whenever the lands have notoriously descende to a man from his mother's fide, this rule is totally reverted and no relation of his by the father's fide, as fuch, can ever admitted to them; because he cannot possibly be of the blood the first purchasor. And so, e converso, if the lands descende from the father's fide, no relation of the mother, as fuc shall ever inherit. So also, if they in fact descended to lob Stiles from his father's mother Cecilia Kempe; here not on the blood of Lucy Baker his mother, but also of George Stile his father's father, is perpetually excluded. And, in like man ner, if they be known to have descended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Bake and of George Stiles, but also of Luke Kempe, the father Cecilia, is excluded. Whereas when the fide from which the descended is forgotten, or never known, (as in the case of a estate newly purchased to be holden ut feudum antiquum) he the right of inheritance first runs up all the father's side, wil a preference to the male stocks in every instance; and, if finds no heirs there, it then, and then only, resorts to the mother's fide; leaving no place untried, in order to find he that may by possibility be derived from the original pu chasor. The greatest probability of finding such was among those descended from the male ancestors; but, upon failu of iffue there, they may possibly be found among those d rived from the females.

THIS I take to be the true reason of the constant preferen of the agnatic fuccession, or issue derived from the male ance tors, thro' all the stages of collateral inheritance; as the ab lity for personal service was the reason for preferring the ma at first in the direct lineal succession. We see clearly, that if ma had been perpetually admitted, in utter exclusion of females, tracing the inheritance back through the male line of ancesto must at last have inevitably brought us up to the first purchaso

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int, as males have not been perpetually admitted, but only merally preferred; as females have not been utterly excluded, not only generally postponed to males; the tracing the inhemance up through the male stocks will not give us absolute emonstration, but only a strong probability, of arriving at hefirst purchasor; which, joined with the other probability, sthe wholeness or entirety of blood, will fall little short of certainty.

BEFORE we conclude this branch of our enquiries, it may other amiss to exemplify these rules by a short sketch of the nanner in which we must search for the heir of a person, as show Stiles, who dies seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity.

In the first place succeeds the eldest son, Matthew Stiles, his issue: (no. 1.) --- if his line be extinct, then Gilbert iles and the other fons, respectively, in order of birth, or eir issue: (no. 2.) .-- in default of these, all the daughters gether, Margaret and Charlotte Stiles, or their iffue (no. 3.) -On failure of the descents of John Stiles himself, the issue Geoffrey and Lucy Stiles, his parents, is called in: viz. A Francis Stiles, the elder brother of the whole blood, or siffue: (no. 4.) --- then Oliver Stiles, and the other whole others respectively, in order of birth, or their issue: (no.5.) then the fifters of the whole blood all together, Bridget MAlice Stiles, or their iffue. (no. 6.) --- In default of these, tiffue of George and Cecilia Stiles, his father's parents; spect being still had to their age and sex: (no. 7.) --- then e issue of Walter and Christian Stiles, the parents of his ternal grandfather: (no. 8.) --- then the issue of Richard d Anne Stiles, the parents of his paternal grandfather's faer: (no. 9.) --- and so on in the paternal grandfather's pamal line, or blood of Walter Stiles, in infinitum. of these, the issue of William and Jane Smith, the paats of his paternal grandfather's mother: (no. 10.)--- and on in the paternal grandfather's maternal line, or blood of

⁽p) See the table of descents annexed.

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Christian Smith, in infinitum; till both the immediate blood of George Stiles, the paternal grandfather, are spent .-- The we must refort to the issue of Luke and Frances Kempe, the parents of John Styles's paternal grandmother (no. 11.) .. then the iffue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (no. 12.) --- and fo on i the paternal grandmother's paternal line, or blood of Luk Kempe, in infinitum .--- In default of which, we must call i the iffue of Charles and Mary Holland, the parents of hi paternal grandmother's mother: (no. 13.) --- and fo on in the paternal grandmother's maternal line, or blood of France Holland, in infinitum; till both the immediate bloods of Ceci lia Kempe, the paternal grandmother, are also spent .-- Where by the paternal blood of John Stiles entirely failing, recoun must then, and not before, be had to his maternal relations or the blood of the Bakers, (no. 14,13,16,) Willis's, (no.1) Thorpes, (no. 18, 19.) and Whites, (no. 20.) in the fait regular fuccessive order as in the paternal line.

THE student should however be informed, that the class no. 10, would be postponed to no. 11, in consequence of the doctrine laid down, arguendo, by justice Manwoode, in the case of Clere and Brooke (q): from whence it is adopted lord Bacon (r), and fir Matthew Hale (s). And yet, no withstanding these respectable authorities, the compiler of the table hath ventured to give the preference therein to no. before no. 11, for the following reasons: 1. Because this poil was not the principal question in the case of Clere and Brook but the law concerning it is delivered obiter only, and in course of argument, by justice Manwoode; though after wards faid to be confirmed by the three other justices in sep rate, extrajudicial, conferences with the reporter. 2. Becau the chief justice, fir James Dyer, in reporting the resoluti of the court in what seems to be the same case (t), takes notice of this doctrine. 3. Because it appears, from Plowder report, that very many gentlemen of the law were diffatish

q) Plowd. 450. (r) Elem. c. 1. (s) H.C. 240. 244. (t) Dyer. 314.

th this position of justice Manwoode. 4. Because the posiin itself destroys the otherwise entire and regular symmeyof our legal course of descents, as is manifest by inspecting he table; and destroys all that constant preference of the ale flocks in the law of inheritance, for which an additional calon is before given, besides the mere dignity of blood. 5. ecause it introduces all that uncertainty and contradiction, hich is pointed out by an ingenious author (u); and estalifies a collateral doctrine, incompatible with the principal ont resolved in the case of Clere and Brooke, viz. the prerence of no. 11 to no. 14. And, though that learned writer roposes to rescind the principal point then resolved, in orer to clear this difficulty; it is apprehended, that the diffilty may be better cleared, by rejecting the collateral docine, which was never yet refolved at all. 6. Because by the ason that is given for this doctrine, in Plowden, Bacon, d Hale, (viz. that in any degree, paramount the first, the wrespecteth proximity, and not dignity of blood) no. 18 ight also to be preferred to no. 16; which is directly conary to the eighth rule laid down by Hale himself (w). 7. ecause this position seems to contradict the allowed doctrine fir Edward Coke (x); who lays it down (under different mes) that the blood of the Kemps (alias Sandies) shall tinherit till the blood of the Stiles's (alias Fairfields) fail. ow the blood of the Stiles's does certainly not fail, till both 9 and no. 10 are extinct. Wherefore no. 11 (being the ood of the Kempes) ought not to inherit till then. 8. Bele in the case, Mich. 12 Edw. IV. 14 (y) much relied on that of Clerke and Brooke) it is laid down as a rule, that ustuy, que doit inheriter al pere, doit inheriter al fits," And fir Matthew Hale (z) fays, " that though the law exdudes the father from inheriting, yet it substitutes and ditests the descent, as it should have been, had the father inherited." Now it is fettled, by the refolution in Clere Brooke, that no. 10 should have inherited to Geoffrey L4

Law of inheritances, 2d edit. pag. 30. 38. 61, 62. 66. Hift.C.L. 247. (x) Co. Litt. 12. Hawk. abr. in loc. (y) Fitz. tit. discent, 2, Bro. Abr. tit. discent, 3. (2) Hift. C. L. 243.

Stiles, the father, before no. 11; and therefore no. 10 oug also to be preferred in inheriting to John Stiles, the son.

In case John Stiles was not himself the purchasor, but estate in fact came to him by descent from his father, mothe or any higher ancestor, there is this difference, that the bloo of that line of ancestors, from which it did not descend, a never inherit. Thus, if it descended from Geoffrey Stile the father, the blood of Lucy Baker, the mother, is perpen ally excluded : and fo, vice verfa, if it descended from Luc Baker, it cannot descend to the blood of Geoffrey Stile This, in either case, cuts off one half of the table from a possible succession. And farther, if it can be shewn to ha descended from George Stiles, this cuts off three fourths for now the blood, not only of Lucy Baker, but also of Co cilia Kempe, is excluded. If, lastly, it descended from Wa ter Stiles, this narrows the succession still more, and cuss feven eighths of the table; for now, neither the blood Lucy Baker, nor of Cecilia Kempe, nor of Christian Smith can ever fucceed to the inheritance. And the like rule wi hold upon descents from any other ancestors.

THE student should bear in mind, that, during this who process, John Stiles is the person supposed to have been a actually seised of the estate. For if ever it comes to rest any other person, as heir to John Stiles, a new order of succession must be observed upon the death of such heir; since, by his own seisin, now becomes himself an ancestor, stiles, and must be put in the place of John Stiles. The gures therefore denote the order, in which the several class would succeed to John Stiles, and not to each other: and before we search for an heir in any of the higher sigures seno. 8) we must be first assured that all the lower classes since in to 7) were extinct, at John Stiles's decease.

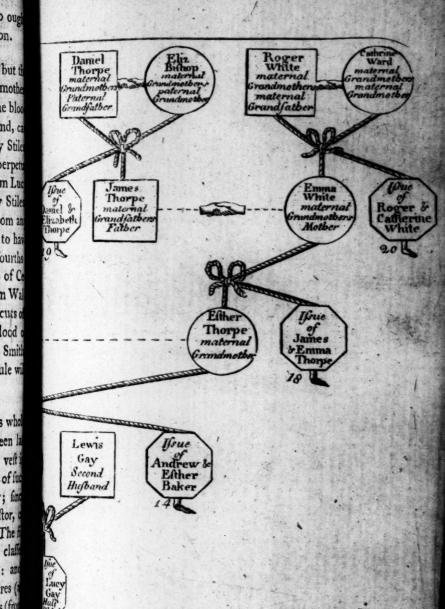
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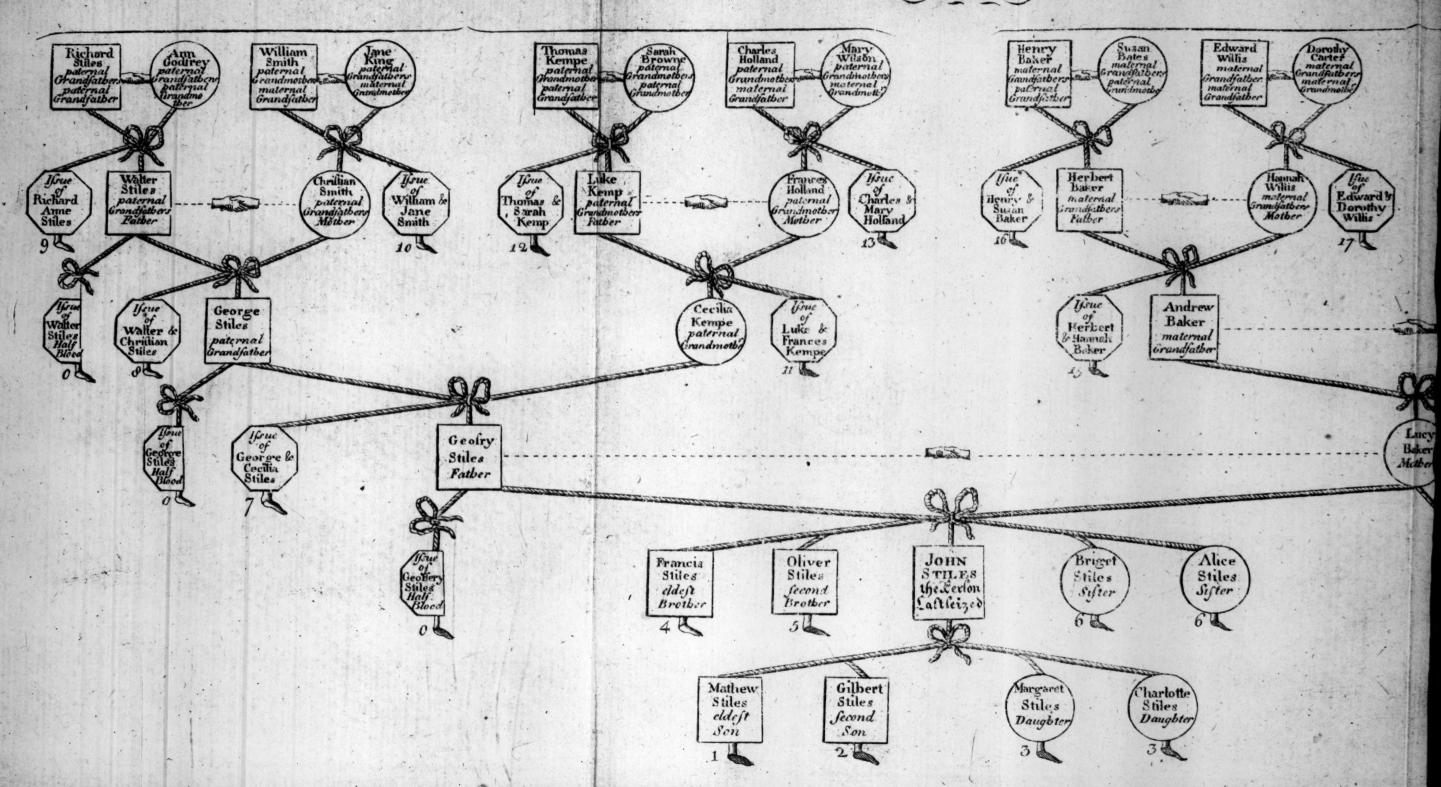
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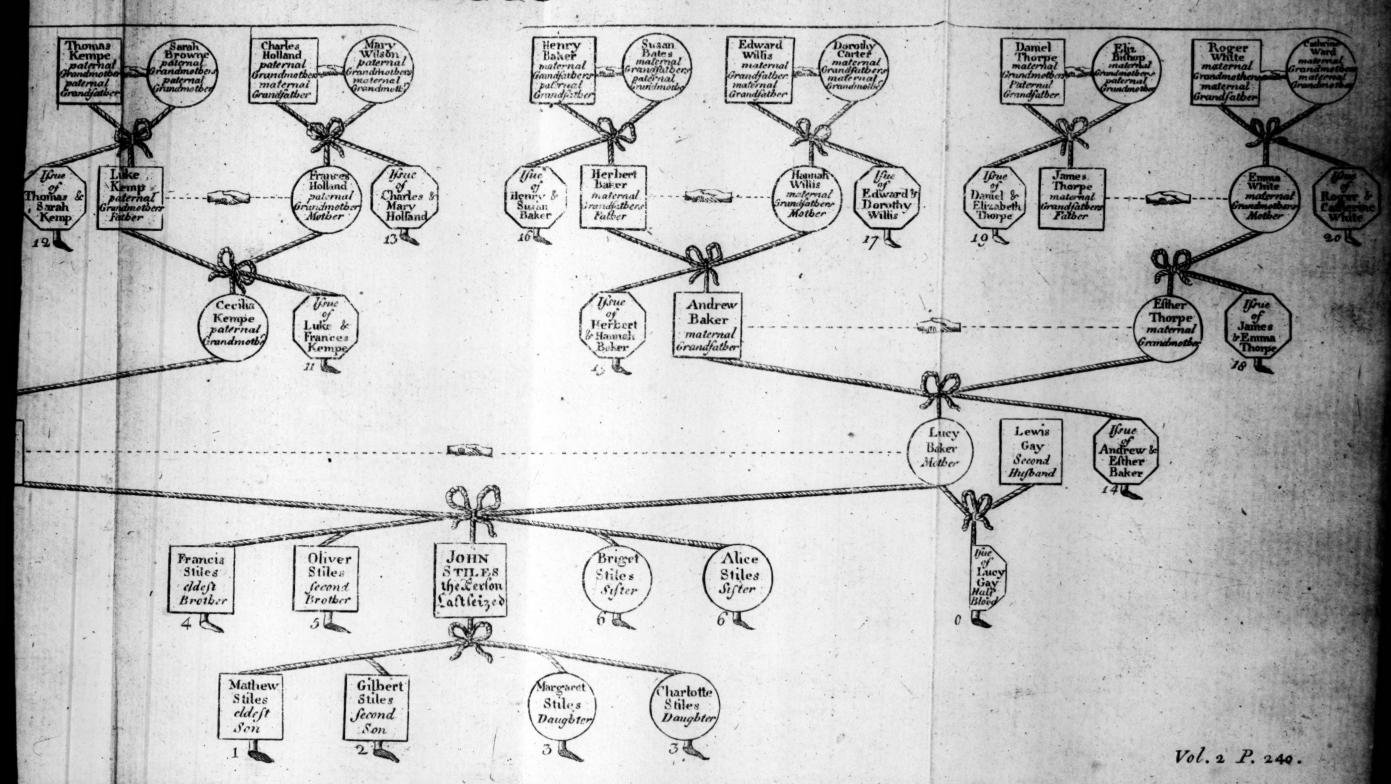
Vol. 2 P. 240



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DURCHASE, perquisitio, taken in its largest and most ex-I tensive sense, is thus defined by Littleton (a); the posfolion of lands and tenements, which a man hath by his own of or agreement, and not by descent from any of his ancestors orkindred. In this case it is contradistinguished from acquisiion by right of blood, and includes every other method of coming to an estate, but merely that by inheritance; wherein the title is vested in a person, not by his own act or agreement, but by the fingle operation of law (b).

PURCHASE, indeed, in its vulgar and confined acceptaion, is applied only to fuch acquisitions of land, as are obtained by way of bargain and fale, for money, or some other valuable confideration. But this falls far short of the legal we of purchase: for, if I give land freely to another, he is ithe eye of the law a purchasor (c); and falls within Litleton's definition, for he comes to the estate by his own greement, that is, he confents to the gift. A man who has his father's estate settled upon him in tail, before he is born, salfo a purchasor; for he takes quite another estate than the of descents would have given him. Nay even if the anofferdevises his estate to his heir at law by will, with other initations or in any other shape than the course of descents rould direct, fuch heir shall take by purchase (d). But if a in feised in fee, devises his whole estate to his heir at law, that the heir takes neither a greater nor a less estate by the devise .

(1) 12. (b) Cr. Litt. 12. (c) Ibid. (d) Lord Raym.

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edvise than he would have done without it, he shall be a judged to take by descent (e), even though it be charged wi incumbrances (f), for the benefit of the creditors, an others, who have demands on the eftate of the anceftor. If remainder be limited to the beirs of Sempronius, here Sen pronius himself takes nothing; but, if he dies during t continuance of the particular estate, his heirs shall take purchasors (g). But, if an estate be made to A for life, n mainder to his right heirs in fee, his heirs shall take by d fcent: for it is an antient rule of law, that wherever the a ceftor takes an estate for life, the heir cannot by the fan conveyance take an estate in fee by descent (h). And if A li before entry, still his heir shall take by descent, and not l purchase; for, where the heir takes any thing that mig have vested in the ancestor, he takes by way of descent The ancestor, during his life, beareth in himself all h heirs (k); and therefore, when once he is or might ha been feifed of the land, the inheritance fo limited to his hei vests in the ancestor himself: and the word "heirs" in the case is not esteemed a word of purchase, but a word of lim tation, enuring fo as to encrease the estate of the ancest from a tenancy for life to a fee-simple. And, had it be otherwise, had the heir (who is uncertain till the death of t ancestor) been allowed to take as a purchasor originally m minated in the deed, as must have been the case if then mainder had been expressly limited to Matthew or Thom by name; then, in the times of first feodal tenure, thele would have been defrauded by fuch a limitation of the fru of his figniory, arising from a descent to the heir.

WHAT we call purchase, perquisitio, the seudists conquest, conquestus, or conquistio (1): both denoting a means of acquiring an estate out of the common course of heritance. And this is still the proper phrase in the law Scotland (m); as it was among the Norman jurists, where

⁽e) 1 Roll. Abr. 626. (f) Salk. 241. Lord Raym. 12 (g) 1 Roll. Abr. 627. (h) 1 Rep. 104. 2 Lev. 60. Ray 334. (i) 1 Rep. 98. (k) Co. Litt. 23. (i) Crag. 1.1 10. §. 18. (m) Dalrymple of feuds. 210.

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yled the first purchasor (that is, he who first brought the fate into the family which at prefent owns it) the conqueror ar (onquereur (n). Which seems to be all that was meant the appellation which was given to William the Norman, hen his manner of ascending the throne of England was, in t is own and his fuccessors charters, and by the historians of the times, entitled conquaessus, and himself conquaessor or mquistor (0); signifying that he was the first of his family the acquired the crown of England, and from whom thered ar ore all future claims by descent must be derived: though ow, from our difuse of the feodal sense of the word, togethe with the reflection on his forcible method of acquisition, the ware apt to annex the idea of wictory to the name of conquest ight conquisition; a title which, however just with regard to the he crown, the conqueror never pretended with halm of England; nor, in fact, ever had (p).

THE difference in effect, between the acquisition of an the flate by descent and by purchase, consists principally in these im wo points: 1. That by purchase the estate acquires a new the pheritable quality, and is descendible to the owner's blood ageneral, and not the blood only of some particular ancestor. or, when a man takes an estate by purchase, he takes it not m feudum paternum or maternum, which would descend only the heirs by the father's or the mother's fide: but he takes ut feudum antiquum, as a feud of indefinite antiquity; hereby it becomes inheritable to his heirs general, first of e paternal, and then of the maternal line (q). 2. An estate ken by purchase will not make the heir answerable for the is of the ancestor, as an estate by descent will. For, if the teeftor by any deed, obligation, covenant, or the like, ndeth himself and his heirs, and dieth; this deed, obligaon, or covenant, shall be binding upon the heir, so far forth by as he had any estate of inheritance vested in him (or in me other in trust for him) (r) by descent from that ancestor,

⁽n) Gr Constom. Gloss. c. 25. pag. 40. (o) Spelm. Gloss. 145. See book I. ch. 3. (q) See pag. 236. (r) Stat. 29 ar, II, c. 3.

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fufficient to answer the charge (s); whether he remains possession, or hath aliened it before action brought (t): whit sufficient estate is in law called assets; from the French wor assez, enough (u). Therefore if a man covenants, for him self and his heirs, to keep my house in repair, I can then (as then only) compel his heir to perform this covenant, when I had an estate sufficient for this purpose, or assets, by descent from the covenantor: for though the covenant descends to their, whether he inherits any estate or no, it lies dorman and is not compulsory, until he has assets by descent (v).

THIS is the legal fignification of the word perquisitio, of purchase; and in this sense it includes the five following me thods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Call these in their order.

I. ESCHEAT, we may remember (w) was one of the fruits and confequences of feodal tenure. The word itself originally French or Norman (x). In which language it is nifies chance or accident; and with us denotes an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the see (y).

by inheritance, as being the fruit of a figniory to which hew entitled by descent, (for which reason the lands escheating sha attend the figniory, and be inheritable by such only of his her as are capable of inheriting the other)(z) it may seem in such sees to fall more properly under the former general head of a quiring title to estates, viz. by descent, (being vested in him)

⁽s) 1 P. Wms. 777. (t) Stat. 3 & 4 W. & M. c. 14. (Finch law. 119. (v) Finch. Rep. 86. (w) See pag. 7 (x) Eschet or echet, formed from the verb eschoir or echeir, happen. (y) 1 Feud. 86. Co. Litt. 13. (z) Co. Lit. 13.

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and not by his own act or agreement) than under hepresent, by purchase. But it must be remembered that, in der to complete this title by escheat, it is necessary that the and perform an act of his own, by entering on the lands and mements fo escheated, or suing out a writ of escheat (a): on ilure of which, or by doing any act that amounts to an imied waiver of his right, as by accepting homage or rent of a anger who usurps the possession, his title by escheat is barred). It is therefore in some respect a title acquired by his nact, as well as by act of law. Indeed this may also be dof descents themselves, in which an entry or other seisin required in order to make a complete title; and therefore sdistribution by our legal writers feems in this respect rarinaccurate: for as escheats must follow the nature of the miory to which they belong, they may vest by either purchase descent, according as the figniory is vested. And, though Edward Coke confiders the lord by escheat as in some rethe fis the affignee of the last tenant (c), and therefore taking burchase; yet, on the other hand, the lord is more frepurchase; yet, on the other hand, the lord is more frefigurely considered as being ultimus baeres, and therefore tation g by descent in a kind of caducary succession

THE law of escheats is founded upon this single principle, the blood of the person last seised in fee-simple is, by some ns or other, utterly extinct and gone; and, fince none can hit his estate but such as are of his blood and confanguiit follows as a regular consequence, that when such blood tinct, the inheritance itself must fail; the land must beewhat the feodal writers denominate feudum apertum; must result back again to the lord of the fee, by whom, he y those whose estate he hath, it was given.

SCHEATS are frequently divided into those propter defectum inisand those propter delictum tenentis: the one fort, if the itdies without heirs; the other, if his blood be attainted (d).

Bro. Abr. tit. escheat. 26. itt. 268. (c) 1 Inft. 215.

⁽b) Ibid. tit. acceptance. 25. (d) Co. Litt. 13, 92.

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But both these species may well be comprehended under first denomination only; for he that is attained suffers are tinction of his blood, as well as he that dies without relation. The inheritable quality is expunged in one instance, and pires in the other; or, as the doctrine of escheats is very suffer expressed in Fleta (e), "dominus capitalis seedi loco have "habetur, quoties per desectum vel delictum extinguitur sung "tenentis."

ESCHEATS therefore arising merely upon the deficiency the blood, whereby the descent is impeded, their door will be better illustrated by considering the several a wherein hereditary blood may be deficient, than by any of method whatsoever.

1, 2, 3. THE first three cases, wherein inheritable bloom wanting, may be collected from the rules of descent laided and explained in the preceding chapter, and therefore need very little illustration or comment. First, when the nant dies without any relations on the part of any of his cestors: secondly, when he dies without any relations on part of the ancestors from whom his estate descended : thin when he dies without any relations of the whole blood. two of these cases the blood of the first purchasor is certain in the other it is probably, at an end; and therefore in a them the law directs, that the land shall escheat to the low the fee: for the lord would be manifestly prejudiced, if, trary to the inherent condition tacitly annexed to all fe any person should be suffered to succeed to lands, who is of the blood of the first feudatory, to whom for his perf merit the estate is supposed to have been granted.

4. A MONSTER, which hath not the shape of mankind, in any part evidently bears the resemblance of the bruted tion, hath no inheritable blood, and cannot be heir to any albeit, it be brought forth in marriage: but, although it

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pennity in any part of its body, yet if it hath human shape, it ybeheir(f). This is a very antient rule in the law of Engd(g): and its reason is too obvious, and too shocking, to raminute discussion. The Roman law agrees with our own excluding such births from successions (h): yet accounts m, however, children in some respects, where the parents, at least the father, could reap any advantage thereby (i); the jus trius liberorum, and the like) esteeming them the stortune, rather than the fault, of that parent. But our will not admit a birth of this kind to be such an issue, salle nittle the husband to be tenant by the curtesy (k); ause it is not capable of inheriting. And therefore, if re appears no other heir than such a prodigious birth, land shall escheat to the lord.

BASTARDS are incapable of being heirs. Bastards by law, are fuch children as are not born either in lawwedlock, or within a competent time after its determion (1). Such are held to be nullius filii, the fons of noy; for the maxim of law is, qui ex damnato coitu nascuninter liberos non computantur (m). Being thus the fons obody, they have no blood in them, at least no inherie blood; consequently, none of the blood of the first hasor: and therefore, if there be no other claimant than a illegitimate children, the land shall escheat to the lord The civil law differs from ours in this point, and ws a bastard to succeed to an inheritance, if after its the mother was married to the father (o): and also, if father had no lawful wife or child, then, even if the conne was never married to the father, yet the and her baftard

Co. Litt. 7. 8. (g) Qui contra formam humani generis conmore procreantur, ut si mulier monstrosum wel prodigiosum sti, inter liberos non computentur. Partus tamen, cui natura abiulum addiderit wel diminuerit, ut si sew vel tantum quatwor in habuerit, bene debet inter liberos connumerari: et, si memsint in utilia aut tortuosa, non tamen est partus monstrosus. on. 1. 1. c. 6. & 1. 5. 17. 5. c. 30. (h) Ff. 1. 5. 14. (i) Ff. 6. 135. Paul. 4. sent. 9. §. 63. (k) Co. Litt. 29. (l) See l. ch. 16. (m) Co. Litt. 8. (n) Fineh. law. 157. (o) Nov. 8.

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tard fon were admitted each to one twelfth of the inherance (p): and a baftard was likewise capable of succeeding the whole of his mother's estate, although she was no married; the mother being sufficiently certain, though stather is not (q). But our law, in favour of marriage, less indulgent to bastards.

THERE is indeed one instance, in which our law has the them fome little regard; and that is usually termed the of bastard eigne and mulier puisne. This happens when an has a bastard son, and afterwards marries the mother, and her has a legitimate fon, who in the language of the law called a mulier, or, as Glanvil (r) expresses it in his Lat filius mulieratus; the woman before marriage being concubi and afterwards mulier. Now here the eldest fon is bastard bastard eigne; and younger son is legitimate, or mulier pui If then the father dies, and the bastard eigne enters upon land, and enjoys it to his death, and dies feifed thereof, whe by the inheritance descends to his iffue; in this case the mu puisse, and all other heirs, (though minors, feme-coverts, under any incapacity whatfoever) are totally barred of the right (s). And this, 1. As a punishment on the mulier for negligence, in not entering during the bastard's life, ander ing him. 2. Because the law will not suffer a man to be b tardized after his death, who entered as heir and died feil and so passed for legitimate in his life-time. 3. Because eanon law (following the civil) did allow fuch baftardeign be legitimate, on the subsequent marriage of his mother: therefore the laws of England (though they would not ad either the civil or canon law to rule the inheritances of kingdom, yet) paid fuch a regard to a person thus peculia circumstanced, that, after the land had descended to his il they would not unravel the matter again, and fuffer hisel to be shaken. But this indulgence was shewn to no other k of bastard; for, if the mother was never married to father, fuch baftard could have no colourable title at all

⁽p) Ibid. c. 12. (q) Cod. 6. 57. 5. (r) 1. 7. c. 1. (s)L § 399. Co. Litt. 244. (t) Litt. §. 400.

As bastards cannot be heirs themselves, so neither can they me any heirs but those of their own bodies. For, as all coleral kindred consists in being derived from the same commancestor, and as a bastard has no legal ancestors, he can meno collateral kindred; and, consequently, can have no all heirs, but such as claim by a lineal descent from himf. And therefore if a bastard purchases land, and dies sed thereof without issue, and intestate, the land shall heat to the lord of the see (u).

6. ALIENS also are incapable of taking by descent, or inning (w): for they are not allowed to have any inheritaeblood in them; rather indeed upon a principle of natial or civil policy, than upon reasons strictly seedal. hough, if lands had been suffered to fall into their hands no owe no allegiance to the crown of England, the design introducing our seuds, the desence of the kingdom, hald have been deseated. Wherefore if a man leaves no her relations but aliens, his land shall escheat to the lord.

As aliens cannot inherit, so far they are on a level with stards; but, as they are also disabled to hold by purchase, they are under still greater disabilities. And, as they are their hold by purchase, nor by inheritance, it is almost resulting to say that they can have no heirs, since they can be nothing for an heir to inherit; but so it is expressly lden (y), because they have not in them any inheritable sod.

And farther, if an alien be made a denizen by the king's ters patent, and then purchases lands, (which the law alws such a one to do) his son, born before his denization, all not (by the common law) inherit those lands; but a son masterwards may, even though his elder brother being; for the father, before denization, had no inheritable blood

⁽a) Bract. 1. 2. c. 7. Co. Litt. 244. (w) Co. Litt. 8. (x) 1.2. (y) loid 1. Lev. 59.

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blood to communicate to his eldest son; but by denizati acquires an hereditary quality, which will be transinito his subsequent posterity. Yet, if he had been naturally act of parliament, such eldest son might then have herited; for that cancels all defects, and is allowed to a retrospective energy, which simple denization has not

SIR Edward Coke (a) also holds, that if an alien com into England, and there hath iffue two fons, who are the natural born subjects; and one of them purchases land. dies; yet neither of these brethren can be heir to the or For the commune vinculum, or common stock of their fanguinity, is the father; and, as he had no inherit blood in him, he could communicate none to his fons: when the fons can by no possibility be heirs to the father one of them shall not be heir to the other. And this opi of his feems founded upon folid principles of the an law; not only from the rule before cited (b), that a que droit inheriter al pere, doit inheriter al fits; but als cause we have seen that the only feodal foundation, which newly purchased land can possibly descend to a ther, is the supposition and fiction of law, that it desce from some one of his ancestors : but in this case as the mediate ancestor was an alien, from whom it could be possibility descend, this should destroy the supposition, impede the descent, and the land should be inherited a dum firicte novum; that is, by none but the lineal de dants of the purchasing brother; and, on failure of should escheat to the lord of the fee. But this opinion been fince overruled (c): and it is now held for law, the fons of an alien, born here, may inherit to each And reasonably enough upon the whole: for, as (in mon purchases) the whole of the supposed descent fro definitive ancestors is but fictitious, the law may as we pose the requisite ancestor as suppose the requisite desc

⁽²⁾ Co. Litt. 129. (a) 1 Inft. 8. (b) See pag. 223 st (c) 1. Ventr. 473. 1. Lev. 59. 1 Sid. 193.

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is also enacted, by the statute 11 & 12 W. III. c. 6. all persons, being natural born subjects of the king, may itand make their titles by descent from any of their ans lineal or collateral; although their father, or mother, her ancestor, by, from, through, or under whom they etheir pedigrees, were born out of the king's allegiance. nconveniences were afterwards apprehended, in case perhould thereby gain a future capacity to inherit, who not exist at the death of the person last seised. As, if is the elder brother of John Stiles be an alien, and the younger be a natural-born subject, upon John's without iffue his lands will descend to Oliver the er brother: now, if afterwards Francis hath a child, feared that, under the statute of king William, this om child might defeat the estate of his uncle Oliver. efore it is provided, by the statute 25 Geo. H. c. 39. o right of inheritance shall accrue by virtue of the foratute to any persons whatfoever, unless they are in be-d capable to take as heirs at the death of the person last --- with an exception however to the case, where lands escend to the daughter of an alien; which daughter sign such inheritance to her after-born brother, or di-with her after-born sisters, according to the usual rule descents by the common law.

y attainder also, for treason or other felony, the blood person attainted is so corrupted, as to be rendered no inheritable.

AT care must be taken to distinguish between forfeilands to the king, and this species of escheat to the which, by reason of their similitude in some circumand because the crown is very frequently the immend of the fee and therefore entitled to both, have been onfounded together. Forfeiture of lands, and of relse the offender possessed, was the doctrine of the

⁽d) See pag. 208 and 214.

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old Saxon law (e), as a part of punishment for the offer and does not at all relate to the feodal system, nor is the sequence of any signiory or lordship paramount (f): but, ing a prerogative vested in the crown, was neither superstand diminished by the introduction of the Norman tenu a fruit and consequence of which escheat must undoubt be reckoned. Escheat therefore operates in subordination this more antient and superior law of forseiture.

THE doctrine of escheat upon attainder, taken fingly this: that the blood of the tenant, by the commission any felony, (under which denomination all treasons were merly comprized) (g) is corrupted and stained, and the ginal donation of the feud is thereby determined, it being ways granted to the vafal on the implied condition of dur ne se gesserit. Upon the thorough demonstration of guilt, by legal attainder, the feodal covenant and m bond of fealty are held to be broken, the estate instantly back from the offender to the lord of the fee, and the ritable quality of his blood is extinguished and blotted of ever. In this situation the law of feodal escheat was bro into England at the conquest; and in general superadd the antient law of forfeiture. In consequence of which ruption and extinction of hereditary blood, the land of lons would immediately revest in the lord, but that the rior law of forfeiture intervenes, and intercepts it in it fage; in case of treason, for ever; in case of other fe for only a year and a day, after which time it goes toth in a regular course of escheat (h), as it would have d the heir of the felon in case the feodal tenures had been introduced. And that this is the true operation genuine history of escheats will most evidently appear this incident to gavelkind lands, (which feem to be t Saxon tenure) that they are in no case subject to esch felony, though they are liable to forfeiture for treason

⁽r) LL. Aelfred. c. 4. LL Caunt. c. 54.

64 Salk. 55.
(g) 3 Inft. 15 Stat. 25 Edw. III. c. 2
(h) 2 Inft. 36.
(i) Somner. 53. Wright. Ten. 118.

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sa consequence of this doctrine of escheat, all lands of ntance immediately revesting in the lord, the wife of the was liable to lose her dower, till the statute 1 Edw. c. 12. enacted, that albeit any perion be attainted of mion of treason, murder, or felony, yet his wife shall ther dower. But she has not this indulgence where the at law of forfeiture operates, for it is expressly provided estatute 5 & 6 Edw. VI. c. 11. that the wife of one atof high treason shall not be endowed at all.

THERTO we have only spoken of estates vested in the the der at the time of his offence or attainder. And here in wof forfeiture stops; but the law of escheat pursues the rftill farther. For, the blood of the tenant being utterly pted and extinguished, it follows, not only that all he mas should escheat from him, but also that he should be thy able of inheriting any thing for the future, This may rillustrate the distinction between forfeiture and escheat. The state of the father be seifed in see, and the son commits but and is attainted, and then the father dies: here the hall escheat to the lord; because the son, by the cornict not his blood, is incapable to be heir, and there can other heir during his life: but nothing shall be forto the king, for the fon never had any interest in the o forfeit (k). In this case the escheat operates, and forfeiture; but in the following instance the forfeiorks, and not the escheat. As where a new felony is by act of parliament, and it is provided (as is frethe case) that it shall not extend to corruption of here the lands of the felon shall not escheat to the ut yet the profits of them shall be forfeited to the king as the offender lives (1).

RE is yet a farther consequence of the corruption and on of hereditary blood, which is this: that the person attainted

⁽k) Co. Litt. 13. (1) 3 Inft. 47.

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attainted shall not only be incapable himself of inheriting transmitting his own property by heirship, but shall all ftruct the descent of lands or tenements to his posterity, i cases where they are obliged to derive their title through from any remoter ancestor. The channel, which conveye hereditary blood from his ancestors to him, is not only hausted for the present, but totally dammed up and rend impervious for the future. This is a refinement upon antient law of feurls, which allowed that the grandfon m be heir to his grandfather, though the fon in the intern ate generation was guilty of felony (m). But, by the of England, a man's blood is so univerfally corrupted b tainder, that his fons can neither inherit to him nor to other ancestor (n), at least on the part of their atta father.

THIS corruption of blood cannot be absolutely remove by authority of parliament. The king may excuse then punishment of an offender; but cannot abolish the pi right, which has accrued or may accrue to individual consequence of the criminal's attainder. He may re forfeiture, in which the interest of the crown is alone cerned: but he cannot wipe away the corruption of bl for therein a third person hath an interest, the lord who by escheat. If therefore a man hath a son, and is attai and afterwards pardoned by the king; this fon can neve herit to his father, or father's ancestors; because his nal blood, being once thoroughly corrupted by his fa attainder, must continue so: but if the son had been after the pardon, he might inherit; because by the parton, the father is made a new man, and may convey new inh ble blood to his after-born children (o).

HEREIN there is however a difference between alien persons attainted. Of aliens, who could never by any fibility be heirs, the law takes no notice: and therefo

(n) Co. Litt

⁽m) Van. Leeuwen in 2 Feud. 31. (o) Ibid. 392.

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ent to a natural-born younger brother. But in attainders otherwise: for if a man hath issue a fon, and is attainted, afterwards pardoned, and then hath iffue a fecond fon, dies; here the corruption of blood is not removed from eldest, and therefore he cannot be heir: neither can the ngest be heir, for he hath an elder brother living, of on the law takes notice, as he once had a possibility of igheir; and therefore the younger brother shall not inhebut the land shall escheat to the lord: though, had the r died without iffue in the life of the father, the younger born after the pardon might well have inherited, for he 100 corruption of blood (p). So if a man hath issue two , and the elder in the lifetime of the father hath iffue, then is attainted and executed, and afterwards the father , the lands of the father shall not descend to the younger for the iffue of the elder, which had once a possibility to the fall impede the descent to the younger, and the land lescheat to the lord (q). Sir Edward Coke in this case ws (r), that if the ancestor be attainted, his sons born we the attainder may be heirs to each other; and distinne hes it from the case of the sons of an alien, because in this the blood was inheritable when imparted to them from father: but he makes a doubt (upon the same principles, h are now overruled) (s) whether fons, born after the inder, can inherit to each other; for they never had any ritable blood in them.

PON the whole it appears, that a person attainted is neiallowed to retain his former estate, nor to inherit any mone, nor to transmit any inheritance to his iffue, either ediately from himself, or mediately through himself from remoter ancestor; for his inheritable blood, which is nery either to hold, to take, or to transmit any feodal proy, is blotted out, corrupted, and extinguished for ever: consequence of which is, that estates, thus impeded in descent, result back and escheat to the lord.

THIS

) Co. Litt. 8. (r) Co. Litt. 8. (s) I (q) Dyer. 48. .P. C. 357.

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units on their th THIS corruption of blood, thus arising from feodal pr ciples, but perhaps extended farther than even those prin ples will warrant, has been long looked upon as a pecu hardship: because, the oppressive parts of the feodal tens being now in general abolished, it seems unreasonable to serve one of their most inequitable consequences; name that the children should not only be reduced to present verty, (which, however severe, is sufficiently justified u reasons of public policy) but also be laid under future d culties of inheritance, on account of the guilt of their ceftors. And therefore in most (if not all) of the new f nies, created by parliament fince the reign of Henry eighth, it is declared that they shall not extend to any com tion of blood: and by the statute 7 Ann. c. 21. (the ope tion of which is postponed by the statute 17 Geo. II. c. it is enacted, that, after the death of the late preten and his fons, no attainder for treason shall extend to the inheriting any heir, nor the prejudice of any person, of than the offender himself: which provisions have indeed ried the remedy farther, than was required by the hard above complained of; which is only the future obstruct of descents, where the pedigree happens to be deduced thro the blood of an attainted ancestor.

BEFORE I conclude this head, of escheat, I must ment one singular instance in which lands held in see-simple are liable to escheat to the lord, even when their owner is no ment and hath left no heirs to inherit them. And this is the case corporation: for if that comes by any accident to be disted, the donor or his heirs shall have the land again in revent and not the lord by escheat: which is perhaps the only instant where a reversion can be expectant on a grant in see-simulation. But the law, we are told (t), doth tacitly and condition to every such gift or grant, that if the corporate dissolved, the donor or grantor shall re-enter; for the

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the gift or grant faileth. This is indeed founded upon the f-fame principle as the law of escheat; the heirs of the dobeing only substituted instead of the chief lord of the fee: hich was formerly very frequently the case in subinfeudatis, till that practice was restrained by the statute of quia prores, 18 Edw. I. ft. 1. to which this very fingular innce still in some degree remains an exception.

THERE is one more incapacity of taking by descent, which, theing productive of any escheat, is not properly reducible this head, and yet must not be passed over in silence. afted by the statute 11 & 12 Will. III. c. 4. that every papist ho shall not abjure the errors of his religion by taking the hs to the government, and making the declaration against mubifantiation, within fix months after he has attained the eof eighteen years, shall be incapable of inheriting, or taks, by descent as well as purchase, any real estates whatsoer; and his next of kin, being a protestant, shall hold them his own use till such time as he complies with the terms posed by the act. This incapacity is merely personal; it Ashimfelf only, and does not destroy the inheritable quality his blood, fo as to impede the descent to others of his kind. In like manner as, even in the times of popery, one to entered into religion and became a monk professed was apable of inheriting lands, both in our own (u) and the feal law; eo quod destit esse miles seculi qui factus est miles rifi; nec beneficium pertinet ad eum qui non debet gerere offim(w). But yet he was accounted only civiliter mortuus; did not impede the descent to others, but the next heir as entitled to his or his ancestor's estate.

THESE are the feveral deficiencies of hereditary blood, regnized by the law of England; which, so often as they hapa, occasion lands to escheat to the original proprietary or ord.

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(u) Co. Litt. 132.

(w) 2 Feud. 21.

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CHAPTER THE SIXTEENTH.

OF TITLE BY OCCUPANCY.

OCCUPANCY is the taking possession of those thing which before belonged to nobody. This, as we has seen (a), is the true ground and foundation of all proper or of holding those things in severalty, which by the law nature, unqualified by that of society, were common to mankind. But, when once it was agreed that every thing a pable of ownership should have an owner, natural reasons gested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence such intention, actually took it into possession, should there gain the absolute property of it; according to that rule the law of nations, recognized by the laws of Rome (b), quintullius est, id ratione naturali occupanti conceditur.

This right of occupancy, so far as it concerns real proper (for of personal chattels I am not in this place to speak) had been confined by the laws of England within a very name compass; and was extended only to a single instance: name where a man was tenant pur auter vie, or had an est granted to himself only (without mentioning his heirs) the life of another man, and died during the life of cessure vie, or him by whose life it was holden: in this case he, the could first enter on the land, might lawfully retain possession for long as cessure que vie lived, by right of occupancy.

(a) See pag. 3 & 8. (b) Ff. 41. 1. 3. (c) Co. Litt. 41

THIS feems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor; who had parted with all his interest, so long ascessay que vie lived: it did not escheat to the lord of the fee; for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it; much less of so minute aremnant as this: it did not belong to the grantee; for he was dead: it did not descend to his heirs; for there were no words of inheritance in the grant : nor could it vest in his executors; for no executors could succeed to a freehold. Belonging therefore to nobody, like the baereditas jacens of the Romans, the law left it open to be feifed and appropriated by the first person that could enter upon it, during the life of ceffuy que vie, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands; for the reversioner hath an equal right with any other man to enter upon the vacant poffession, and where the king's title and a fubject's concur, the king's shall be always preferred: against the king therefore there could be no prior occupant, because nullum tempus occurrit regi (d). And, even in the case of a subject, had the estate pur auter vie been granted to aman and his heirs during the life of ceftuy que vie, there the heirmight, and still may, enter and hold possession, and is called in law a special occupant; as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this haereditas jacens, during the refidue of the estate granted : though some have thought him so called with no very great propriety (e); and that fuch estate is rather a descendible freehold. But the title of common occupancy is now reduced almost to nothing by two statutes; the one, 29 Car. II. c. 3. which enacts, that where there is no special occupant, in whom the estate may vest, the tenant pur auter vie may devise it by will, or it shall go to the executors and be affets in their hands for payment of debts: the other that of 14 Geo. II. c. 20. which M 2 enacts.

⁽d) Co. Litt. 41.

⁽e) Vaugh. 201.

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enacts, that it shall vest not only in the executors, but, in case the tenant dies intestate, in the administrators also; and go in a course of distribution like a chattel interest.

By these two statutes the title of common occupancy is utterly extinct and abolished : though that of special occupancy, by the heir at law, continues to this day; fuch heir being held to fucceed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant, specially marked out and appointed by the original grant. The doctrine of common occupancy may however be usefully remembered on the following account, among others: that, as by the common law no occupancy could be of incorporeal hereditaments, as of rents, tithes, advowfons, commons, or the like (f), (because, with respect to them, there could be no actual entry made, or corporal seisin had; and therefore by the death of the grantee pur auter vie grant of such hereditaments was entirely determined) (g) fo now, I apprehend, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For the statutes must not be construed so as to create any new estate, or to keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and which therefore was left open to the first occupant. When there is a residue left, the statutes give it to the executors and administrators, instead of the first occupant; but they will not create a refidue on purpose to give it to either. They only meant to provide an appointed inflead of a cafual, a certain instead of an uncertain, owner, of lands which before were nobody's; and thereby to supply this casus omissus, and render the disposition of law in all respects uniform: this being the only instance wherein a title to area estate could ever be acquired by occupancy.

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⁽f) Co. Litt. 41.

⁽g) Vaugh, 201.

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This, I say, was the only instance; for I think there can be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no actual owner of the land till a successor be appointed, yet there is a legal, potential ownership, substituting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be sound in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the see, by escheat.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rifing of an island in a river, or by the alluvion or dereliction of the sea; in these instances the law of England assigns them an immediate owner. For Bracton tells us (h), that if an island arise in the middle of a river, it belongs in common to those who have lands on each fide thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law (i). Yet this feems only to be reasonable, where the foil of the river is equally divided between the owners of the opposite shores: for if the whole soil is the freehold of any one man, as it must be whenever a several fishery is claimed (k), there it seems just (and so is the usual practice) that the eyotts or little islands, arising in any part of the liver, shall be the property of him who owneth the pifcary and the foil. However, in case a new island rise in the sea, though the civil law gives it to the first occupant (1), yet ours give it to the king (m). And as to lands gained from M 3 the

⁽h) l. 2. c. 2. (i) Inft. 2. 1. 22. (k) Salk. 637. (l) Inft. 2. 1. 18. (m) Bract. l. 2. c. 2. Callis of fewers. 22.

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the fea, either by alluvion, by the washing up of fand and earth, so as in time to make terra firma; or by dereliction, as when the fea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by finall and imperceptible degrees, it shall go to the owner of the land adjoining (n). For de minimis non curat lex: and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal confideration for fuch possible charge or lofs. But if the alluvion or dereliction be fudden and confiderable, in this case it belongs to the king; for, as the king is lord of the fea, and fo owner of the foil while it is covered with water, it is but reasonable he should have the foil, when the water has left it dry (o). So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's, or the fubject's property. In the fame manner if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a fudden and violent flood, or other halty means, and thereby a man loses his ground, he shall have what the river has left in any other place, as a recompense for this sudden loss (p). And this law of alluvious and derelictions, with regard to rivers, is nearly the same in the imperial law (q); from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to marine increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before-mentioned, as upon this other general ground of prerogative, which was formerly remarked (r), that whatever hath no other owner is vested by law in the king.

⁽n) 2 Roll. Atr. 170. Dyer. 326. (o) Callis. 24. 28. (p) Ibid. 28. (q) Inft. 2. 1. 20, 21, 22, 23, 24. (r) See Vol. I. pag. 298.

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CHAPTER THE SEVENTEENTH.

TITLE BY PRESCRIPTION.

A THIRD method of acquiring real property by purchase is that by prescription; as when a man can shew no ther title to what he claims, than that he, and those under thom he claims, have immemorially used to enjoy it. Conming customs, or immemorial usages, in general, with the weral requisites and rules to be observed, in order to prove the existence and validity, we enquired at large in the preding part of these commentaries (a). At present therefore shall only, first, distinguish between custom, strictly taken, ad prescription; and then shew, what fort of things may be establed for.

AND, first, the distinction between custom and prescription this; that custom is properly a local usage, and not annexed any person; such as, a custom in the manor of Dale that lands all descend to the youngest son: prescription is merely a sonal usage; as, that Sempronius, and his ancestors, or those bosestate he hath, have used time out of mind to have such advantage or privilege (b). As for example: if there be a sign in the parish of Dale, that all the inhabitants of that with may dance on a certain close, at all times, for their retain; (which is held (c) to be a lawful usage) this is strictly sustom, for it is applied to the place in general, and not to y particular persons: but if the tenant, who is seised of M4

(a) See Vol. I. pag. 75, &c. (b) Co. List. 113. (c) 1

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the manor of Dale in fee, alleges that he and his ancestors, all those whose estate he hath in the said manor, have u time out of mind to have common of pasture in such a clo this is properly called a prescription; for this is a usage a nexed to the person of the owner of this estate. All prescri tion must be either in a man and his ancestors, or in a m and those whose estate he hath (d); which last is called pr scribing in a que estate. And formerly a man might, by common law, have prescribed for a right which had been e joyed by his ancestors or predecessors at any distance of tim though his or their enjoyment of it had been suspended (e) an indefinite feries of years. But by the statute of limita ons, 32 Hen. VIII. c. 2. it is enacted, that no person h make any prescription by the seisin or possession of his and tor or predecessor, unless such seifin or possession hath be within threefcore years next before fuch prefcription made(

SECONDLY, as to the feveral species of things which me or may not, be prescribed for: we may in the first place, of serve, that nothing but incorporeal hereditaments can be claim by prescription: as a right of way, a common, &c; but that prescription can give a title to lands, and other coporeal suffances, of which more certain evidence may he had (g). For man can be said to prescribe, that he and his ancestors had immemorially used to hold the castle of Arundel: for this clearly another fort of title; a title by corporal seisin and indivitance, which is more permanent, and therefore more capate of proof, than that of prescription. But, as to a right of way common, or the like, a man may be allowed to prescribe; for these there is no corporal seisin, the enjoyment will be frequently intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. 2. A prescription me

⁽d) 4 Rep. 32. (e) Co. Litt. 113. (f) This title, of feription, was well known in the Roman law by the name of a capio; (Ff. 41. 3 3.) so called, because a man, that gains at by prescription, may be said usurem capere. (g) Dr. & S. d. 1. c. 8. Finch. 132.

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always be laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecillity of their estates (h). For, as prefeription is usage beyond time of memory, it is abfurd that they should pretend to prescribe, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As, if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead, that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the faid manor, and that John Stiles demised the faid manor, with its appurtenances, to him the said tenant for life. 3. A prescription cannot be for a thing which cannot be raifed by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus a lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by prescription (i). 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; fuch, as, for infance, the royal franchises of deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and h made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasuretrove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record (k). 5. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a que estate, or in himself and his ancestors. For if a man prescribes in a que estate, M 5 (that

⁽h) 4 Rep. 31, 32. (i) 1 Ventr. 387. (k) Co. Litt. 114.

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(that is, in himself and those whose estate he holds) nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be abfurd to claim any thing as the consequence, or appendix, of an estate, with which the thing claimed has no connexion: but, if he prescribes in himself and his ancestors he may prescribe for any thing whatsoever that lies in grant not only things that are appurtenant, but also such as man be in gross (1). Therefore a man may prescribe, that he and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as appendant to that manor: but if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors So also a man may prescribe in a que estate for a commo appurtenant to a manor; but, if he would prescribe for common in gross, he must prescribe in himself and his ancel tors. 6. Lastly, we may observe, that estates gained by pre fcription are not, of course, descendible to the heirs gene ral, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rathe to be considered as an evidence of a former acquisition, that as an acquisition de novo: and therefore, if a man prescribe for a right of way in himfelf and his ancestors, it will de feend only to the blood of that line of ancestors in whom h fo prescribes; the prescription in this case being indeed species of descent. But, if he prescribes for it in a que estate it will follow the nature of that estate in which the prescrip tion is laid, and be inheritable in the fame manner, whether that be acquired by descent or purchase: for every accessor followeth the nature of its principal.

(1) Litt. §. 183. Finch, L. 104.

CHAPTE

CHAPTER THE EIGHTEENTH.

OF TITLE BY FORFEITURE.

PORFEITURE is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest herein, and they go to the party injured, as a recompense of the wrong which either he alone, or the public together with himself, hath sustained.

LANDS, tenements, and hereditaments, may be forfeited a various degrees and by various means: 1. By crimes and disdemessors. 2. By alienation contrary to law. 3. By compresentation to a benefice, when the forfeiture is denominated a lapse. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold asserts. 8. By bankruptcy.

I. The foundation and justice of forfeitures for crimes and ischemes for so, and the several degrees of those forfeitures, poportioned to the several offences, have been hinted at in preceding volume (a); but will be more properly contered, and more at large, in the fourth book of these communitaries. At present I shall only observe in general, that the offences which induce a forfeiture of lands and tenements the crown are principally the following six; 1. Treason.

2. Felony.

(a) Vol. I. pag. 299.

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2. Felony. 3. Misprission of treason. 4. Praemunire. 5. Drawing a weapon on a judge, or striking any one in the presence of the king's principal courts of justice. 6. Popish recusancy or non-observance of certain laws enacted in restraint of papists. But at what time they severally commence, how sa they extend, and how long they endure, will with greate propriety be observed as the object of our future enquiries.

II. LANDS and tenements may be forfeited by alienation or conveying them to another, contrary to law. This is either alienation in mortmain, alienation to an alien, or alienation by particular tenants; in the two former of which case the forfeiture arises from the incapacity of the alience take, in the latter from the incapacity of the alienor to grant

ALIENATION in mortmain, in mortua manu, is a alienation of lands or tenements to any corporation, foleo aggregate, ecclesiastical or temporal. But these purchase having been chiefly made by religious houses, in confe quence whereof the lands became perpetually inherent in on dead hand, this hath occasioned the general appellation mortmain to be applied to fuch alienations (b), and the re ligious houses themselves to be principally considered in forming the statutes of mortmain; in deducing the history of which statutes, it will be matter of curiofity to observe the great address and subtile contrivance of the ecclesation eluding from time to time the laws in being, and the zer with which fuccessive parliaments have pursued ther through all their fineffes: how new remedies were fail the parents of new evafions; till the legislature at last, thoug with difficulty, hath obtained a decifive victory.

By the common law any man might dispose of his landst any other private man at his own discretion, especially whe the seedal restraints of alienation were worn away. Yet is consequence of these it was always, and is still, necessary (c)

⁽b) See Vol. I. pag. 479. (c) F. N. B. 121.

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or corporations to have a licence of mortmain from the nown, to enable them to purchase lands: for as the king is be ultimate lord of every fee, he ought not, unless by his m consent, to lose his privilege of escheats and other feodal rofits, by the vesting of lands in tenants that can never be mainted or die. And fuch licences of mortmain feem to have ten necessary among the Saxons, above fixty years before e Norman conquest (d). But, besides this general licence on the king, as lord paramount of the kingdom, it was alfo quifite, whenever there was a mesne or intermediate lord tween the king and the alienor, to obtain his licence also upon the same seodal principles) for the alienation of the spefic land. And if no fuch licence was obtained, the king or her lord might respectively enter on the lands so aliened in ortmain, as a forfeiture. The necessity of this licence from grown was acknowleged by the constitutions of Clarenm (e), in respect of advowsons, which the monks always eatly coveted, as being the groundwork of subsequent apopriations (f). Yet such were the influence and ingenuity the clergy, that (not with standing this fundamental princie) we find that the largest and most considerable dotations religious houses happened within less than two centuries afthe conquest. And (when a licence could not be obtained) ir contrivance seems to have been this: that, as the forture for fuch alienations accrued in the first place to the mediate lord of the fee, the tenant who meant to alienate fconveyed his lands to the religious houses, and instantly k them back again, to hold as tenant to the monastery; ich kind of instantaneous seisin was probably held not to asson any forfeiture: and then, by pretext of some other feiture, furrender, or escheat, the society entered into selands in right of such their newly acquired signiory, as mediate lords of the fee. But, when thefe dotations began grow numerous, it was observed that the feodal services, lained for the defence of the kingdom, was every day visiwithdrawn; that the circulation of landed property from man

Selden. Jan. Angl. I. 2. §. 45. (e) Ecclesiae seudo domini unon possunt in perpetuum dari, absque assensu et consensione ip-1.2. A. D. 1164. (f) See Vol. I. pag. 384.

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man to man began to stagnate; and that the lords were of tailed of the fruits of their signiories, their escheats, was ships, reliefs, and the like: and therefore, in order to perfect this, it was ordained by the second of king Henry II great charters (g), and afterwards by that printed in common statute-books, that all such attempts shall be vound the land forfeited to the lord of the see (h).

But, as this prohibition extended only to religious hou bishops and other fole corporations were not included there and the aggregate ecclefiaftical bodies (who, Sir Edward C observes (i), in this were to be commended, that they e had of their council the best learned men that they could found many means to evade this statute, by buying lands that were bona fide holden of themselves as lords of fee, and thereby evading the forfeiture; or by takingle leases for years, which first introduced these extensive ten for a thousand or more years, which are now so frequent conveyances. This produced the statute de religiosis, 7 Ed I; which provided, that no perfin, religious or other wh foever, should buy, or fell, or receive, under pretenced gift, or term of years, or any other title whatsoever, should by any art or ingenuity appropriate to himself, lands or tenements in mortmain; upon pain that the ima diate lord of the fee, or, on his default for one year, the lo paramount, and in default of all of them, the king, mi enter thereon as a forfeiture.

This seemed to be a sufficient security against all alied tions in mortman: but, as these statutes extended only gifts and conveyances between the parties, the religious hou now began to set up a sickinious title to the land, which its intended they should have, and to bring an action to recove

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int the tenant; who, by fraud and collusion, made no face, and thereby judgment was given for the religious the, which then recovered the land by fentence of law upon apposed prior title. And thus they had the honour of ining those fictitious adjudications of right, which are since ome the great affurance of the kingdom, under the name ammon recoveries. But upon this the statute of Westofter the second, 13 Edw. I. c. 32. enacted, that in such sajury shall try the true right of the demandants or plainto the land, and if the religious house or corporation be nd to have it, they shall still recover seisin; otherwise it lbe forfeited to the immediate lord of the fee, or else to next lord, and finally to the king, upon the immediate ther lord's default. And the like provision was made by facceeding chapter (k), in case the tenants set up crosses ntheir lands (the badges of knights templars and hospiers) in order to protect them from the feodal demands of rlords, by virtue of the privileges of those religious and tary orders. And so careful was this provident prince to rent any future evasions, that when the statute of quia bres, 18 Edw. I. abolished all subinfeudations, and gave ty for all men to alienate their lands to be holden of the timmediate lord (1), a proviso was inserted (in) that this ld not exceed to authorize any kind of alienation in morta. And when afterwards the method of obtaining the is licence by writ of ad quod damnum was marked out, he statute 27 Edw. I. st. 2. it was farther provided by tte 34 Edw. I. ft. 3. that no fuch licence should be effec. , without the confent of the mesne or intermediate lords,

tr still it was found difficult to set bounds to ecclesiastiingenuity: for when they were driven out of all their
mer holds, they devised a new method of conveyance, by
the lands were granted, not to themselves directly, but
ominal seosses to the use of the religious houses; thus
inguishing between the pessession and the use, and receiving

⁽k) cap. 33. (1) 2 Inft. 501. (m) cap. 3.

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the actual profits, while the feifin of the land remained the nominal feoffee: who was held by the courts of eq (then under the direction of the clergy) to be bound in science to account to his cestuy que use for the rents and luments of the estate. And it is to these inventions that practifers are indebted for the introduction of uses and h the foundation of modern conveyancing. But, unfortun for the inventors themselves, they did not long enjoy the vantage of their new device, for the statute 15 Ric. II. enacts, that the lands which had been so purchased to should be amortised by licence from the crown, or elsebe to private persons; and that, for the future, uses that subject to the statutes of mortmain, and forfeitable lik lands themselves. And whereas the statutes had beenel by purchasing large tracts of land, adjoining to churches. confecrating them by the name of church-yards, fuch tile imagination is also declared to be within the compa the statutes of mortmain. And civil or lay corporation well as ecclefiaftical, are also declared to be within the chief, and of course within the remedy provided by the lutary laws. And, laftly, as during the times of popery were frequently given to superstitious uses, though not corporate bodies; or were made liable in the hands of and devisees to the charge of obits, chaunteries, and the which were equally pernicious in a well-governed flate: tual alienations in mortmain; therefore, at the dawn of reformation, the statute 23 Hen. VIII. c. 10. declares, all future grants of lands for any of the purposes afores granted for any longer term than twenty years, shall be

But, during all this time, it was in the power of crown, by granting a licence of mortmain, to remit the feiture, so far as related to its own rights; and to enable spiritual or other corporation to purchase and hold any or tenements in perpetuity: which prerogative is declare confirmed by the statute 18 Edw. III. St. 3. c. 3. But doubts were conceived at the time of the revolution has such licence was valid (n), since the king had no power.

(n) 2 Hawk. P. C. 391.

hense with the statute mortmain by a clause of non obout (0), which was the usual course, though it seems to we been unnecessary (p); and as, by the gradual declenm of mesne signiories through the long operation of the state of quia emptores, the rights of intermediate lords were duced to a very small compass; it was therefore provided the statute 7 & 8 W. III. c. 37. that the crown for the mre at its own discretion may grant licences to aliene or kin mortmain, of whom soever the tenements may be holden.

AFTER the dissolution of monasteries under Henry VIII. ough the policy of the next populh fuccessor affected to grant fecurity to the possessors of abbey lands, yet, in order to rein so much of them as either the zeal or timidity of their mers might induce them to part with, the statutes of mortin were suspended for twenty years by the statute 1 & 2 P. M. c. 8 and, during that time, any lands or tenements reallowed to be granted to any spiritual corporation withtany license whatsoever. And, long afterwards, for a ach better purpose, the augmentation of poor livings, it senacted by the statute 17 Car. II. c. 3. that appropriators yannex the great tithes to the vicarages: and that all beices under 1001. per annum may be augmented by the purate of lands, without licence of mortmain in either case: the like provision hath been since made, in favour of governors of queen Anne's bounty (q). It hath also been d(r), that the statute 23 Hen. VIII. before-mentioned did textend to any thing but superstitious uses: and that thereta man may give lands for the maintenance of a school, hospital, or any other charitable uses. But as it was aphended from recent experience, that persons on their deathsmight make large and improvident dispositions even for fe good purposes, and defeat the political ends of the stas of mortmain; it is therefore enacted by the statute 9 o. II. c. 36. that no lands or tenements, or money to be out thereon, shall he given for or charged with any charitable

Stat. 1 W. & M. ft. 2. c. 2. (p) C. Litt. 99 3 Ann. c. 11 (1) 1 Rep. 24.

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charitable uses whatsoever, unless by deed indented, execut in the presence of two witnesses twelve calendar months to fore the death of the donor, and enrolled in the court chancery within six months after its execution, (except stock in the public funds, which may be transferred within months previous to the donor's death) and unless such go be made to take effect immediately, and be without pow of revocation: and that all other gifts shall be void. To two universities, their colleges, and the scholars upon to foundation of the colleges of Eaton, Winchester, and We minster, are excepted out of this act: but such exemption was granted with this proviso, that no college shall be at berty to purchase more advowsons, than are equal in number to one moiety of the fellows or students, upon the repective foundations.

- 2. SECONDLY, alienation to an alien is also a cause of so feiture to the crown of the lands so alienated; not only on a count of his incapacity to hold them, which occasions him to passed by in descents of land (s), but likewise on account of presumption in attempting, by an act of his own, to acquire a real property; as was observed in the preceding volume (t).
- 3. LASTLY, alienations ly particular tenants, when the are greater than the law entitles them to make, and deverthe remainder or reversion (v), are also forseitures to have whose right is attacked thereby. As, if tenant for his or life alienes by seossement or sine for the life of another, or tail, or in see; these being estates, which either must or make last longer than his own, the creating them is not only by your his power, and inconsistent with the nature of his in rest, but is also a forseiture of his own particular estate him in remainder or reversion (u). For which there seem be two reasons. First, because such alienation amounts to renunciation of the seodal connexion and dependence; it is plies a resusal to perform the due renders and services to lord of the see, of which fealty is constantly one; and

⁽s) See pag. 249. 250. (t) Book I. pag. 372. (v) Co. L. 251. (u) Li t. §. 415.

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sinits consequence to d f at and devest the remainder or mon expectant: as therefore that is put in jeopardy, by aft of the particular tenant, it is but just that, upon overy, the particular estate should be forfeited and taken him, who has fhewn fo manifest an inclination to make aproper use of it. The other reason is, because the parbr tenant, by granting a larger estate than his own, has kown act determined and put an entire end to his own mal interest; and on fuch determination the next taker tiled to enter regularly, as in his remainder or reversion. ame law, which is thus laid down with regard to tesfor life, holds also with respect to all tenants of the freehold, or of chattel interests; but if tenant in tail sinfee, this is no immediate ferfeiture to the remainman, but a mere discontinuance (as it is called) (w) of fate-tail, which the iffue may afterwards avoid by due tof law (x): for he in remainder or reversion hath only vremote and barely possible interest therein, until the in tail is extinct. But, in case of such forfeitures by ular tenants, all legal estates by them before created, tenant for twenty years grants a lease for fifteen, and all s by him lawfully made on the lands, shall be good wailable in law (y). For the law will not hurt an intheffee for the fault of his leffor; nor permit the leffor. he has granted a good and lawful estate, by his own pavoid it, and defeat the interest which he himself has

wivalent, both in its nature and its consequences, illegal alienation by the particular tenant, is the civil of disclaimer; as where a tenant, who holds of any neglects to render him the due services, and, upon an abrought to recover them, disclaims to hold of his lord. It disclaimer of tenure in any court of record is a fortof the lands to the lord (z), upon reasons most apparticular. And so likewise, if in any court of record the particular

See book III. ch. 10. (x) Litt. § 595, 6, 7. Litt. 233. (z) Finch. 270, 271.

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particular tenant does any ast which amounts to a vidifclaimer; if he claims any greater estate than was ghim at the first infeodation, or takes upon himself those which belong only to tenants of a super or class (a); if firms the reversion to be in a stranger, by accepting him attorning as his tenant, collusive pleading, and the like such behaviour amounts to a forseiture of his particular

III. LAPSE is a species of forfeiture, whereby the ri presentation to a church accrues to the ordinary by neg the patron to present, to the metropolitan by neglect ordinary, and to the king by neglect of the metron For it being for the interest of religion, and the good public, that the church should be provided with an offi minister, the law has therefore given this right of lay order to quicken the patron: who might otherwise, h fering the church to remain vacant, avoid paying his hastical dues, and frustrate the pious intentions of his tors. This right of lapfe was first established about the (though not by the authority) (c) of the council of I (d), which was in the reign of our Henry the fecond the bishops first began to exercise universally the right flitution to churches (e). And therefore, where then right of institution, there is no right of lapse: so that native can lapse to the ordinary (f), unless it hath bee mented by the queen's bounty (g). But no right of can accrue, when the original prefentation is in the crow

THE term, in which the title to present by lapse a from the one to the other successively, is six calendar mon (following in this case the computation of the church, a the usual one of the common law) and this exclusive of

⁽a) Co. Litt. 252. (b) Ibid. 253. (c) 2 Roll. A pl. 10. (d) B acton. 1. 4. tr. 2. c. 3. (e) See (f) Bro. Abr. tit Quar. Imped. 131. Cro. Jac. 518. (I Geo. I. tt 2. c. 10. (h) Stat. 17 Edw. II. c. 8. 2 la (i) 6 Rep 62. Registr 42.

avoidance (k). But if the bishop be both patron and my, he shall not have a double time allowed him to col-); for the forfeiture accrues by law, whenever the neghas continued fix months in the fame person. fithe bishop doth not collate his own clerk immediately living, and the patron presents, though after the fix sare lapfed, yet his prefentation is good, and the bishop milto institute the patron's clerk (m). For as the law wes the bishop this title by lapse, to punish the patron's ence, there is no reason that, if the bishop himself be of equal or greater negligence, the patron should be ed of his turn. If the bishop suffer the presentation to . with metropolitan, the patron also has the same advanthe presents before the arch-bishop has filled up the ie; and that for the fame reason. Yet the ordinary canfter lapse to the metropolitan, collate his own clerk to ejudice of the arch-billiop (n). For he had no permaight and interest in the advowson, as the patron hath, rely a temporary one; which having neglected to make during the time, he cannot afterwards retrieve it. But presentation lapses to the king, prerogative here interand makes a difference; and the patron shall never rehis right, till the king has fatisfied his turn by prefentafor nullum tempus occurrit regi (0). And therefore it m, as if the church might continue void for ever, uneking shall be pleased to present; and a patron thereabsolutely defeated of his advowson. But to prevent tonvenience, the law has lodged a power in the pahands, of as it were compelling the king to present. during the delay of the crown, the patron himself ts, and his clerk is instituted, the king indeed by preanother may turn out the patron's clerk; but if he it, and the patron's clerk dies incumbent, or is cally deprived, the king hath loft his right, which was the next or first presentation (p). IN

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² Inft. 161. (1) Gibf. Cod. 769. (m) 2 Inft. (n) 2 Roll. Abr. 368. (n) Dr. & St. d. 2. c. 36. (p) 7 Rep. 28. Cro. Eliz. 44. ar. 355.

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In case the benefice becomes void by death, or c though plurality of benefices, there the patron is bou take notice of the vacancy at his own peril; for the matters of equal notoriety to the patron and ordinary: case of a vacancy by refignation, or canonical deprivation if a clerk presented be refused for insufficiency, these matters of which the bishop alone is presumed to be cogn here the law requires him to give notice thereof to t tron, otherwise he can take no advantage by way of lap Neither shall any lapse thereby accrue to the metropoli to the king; for it is univerfally true, that neither the bishop or the king shall ever present by lapse, but whe immediate ordinary might have collated by lapfe, with fix months, and hath exceeded his time: for the first beginning faileth, et quod non babet principium, non finem (r). If the bishop refuse or neglect to examine an mit the patron's clerk, without good reason assigned tice given, he is styled a disturber by the law, and sha have any title to present by lapse : for no man shall ta vantage of his own wrong (s). Also if the right of pre tion be litigious or contested, and an action be broughts the bishop to try the title, no lapse shall incur till theq of right be decided (t).

IV. By fimony the right of presentation to a living feited, and vested pro hac vice in the crown. Simony corrupt presentation of any one to an ecclesiastical before money, gift, or reward. It is so called from the blance it is said to bear to the sin of Simon Magus, thou purchasing of holy orders seems to approach nearer to fence. It was by the canon law a very grievous crim is so much the more odious, because, as sir Edward Co serves (u), it is ever accompanied with perjury; for the serves is sometiment of the server accompanied with perjury; for the server accompanied most property is some an offence punishable in a criminal way at the

⁽q) 4 Rep. 75. 2 Inst. 632. (r) Co. Litt. 3. (s) 2 Roll. Abr. 369. (t) Co. Litt. 344. (u) 3 ln

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non law (w); it being thought sufficient to leave the clerk to defialtical censures. But as these did not affect the simulated patron, nor were efficacious enough to repel the notoins practice of the thing, divers acts of parliament have en made to restrain it by means of civil forfeitures; which a modern prevailing usage, with regard to spiritual preferents, calls aloud to be put in execution. I shall briefly confer them in this place, because they divest the corrupt para of the right of presentation, and vest a new right in the swn.

By the statute 31 Eliz. c. 6. it is for avoiding simony enied, that if any patron for any corrupt consideration, by
storpromise, directly or indirectly, shall present or collate
sperson to an ecclesiastical benefice or dignity; such pretation shall be void, and the presentee be rendered incapasof ever enjoying the same benefice: and the crown shall
sent to it for that turn only (x). Also by the statute 12
m. stat. 2. c. 12. if any person for money or profit shall prore, in his own name or the name of any other, the next
sentation to any living ecclesiastical, and shall be presented
reupon, this is declared to be a simoniacal contract; and
party is subjected to all the ecclesiastical penalties of simois disabled from holding the benefice, and the presentaidevolves to the crown.

PON these statutes many questions have arisen, with reto what is and what is not simony. And, among others,
epoints seem to be clearly settled: 1. That to purchase a
smatton, the living being actually vacant, is open and
mous simony (y); this being expressly in the face of the
nte. 2. That for a clerk to bargain for the next presensm, the incumbent being sick and about to die, was simoeven before the statute of queen Anne (z): and now, by
statute, to purchase, either in his own name or another's,
the

Moor. 564. (x) For other penalties inflicted by this stasee book IV. ch. 4. (y) Cro. Eliz. 788. Moor. 914.

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the next presentation, and be thereupon presented at any ture time to the living, is direct and palpable fimony. 3. It is held that for a father to purchase such a presentati in order to provide for his fon, is not fimony : for the for not concerned in the bargain, and the father is by na bound to make a provision for him (a). 4. That if a sime acal contract be made with the patron, the clerk not be privy thereto, the prefentation for that turn shall indeed volve to the crown, as a punishment of the guilty patron; the clerk, who is innocent, does not incur any disabiling forfeiture (b). 5. That bonds given to pay money to ch table uses, on receiving a presentation to a living, are fimoniacal (c), provided the patron or his relations be not mefited thereby (d): for this is no corrupt confideration, n ing to the patron. That bonds of refignation, in ca non-residence or taking any other living, are not sime cal (e); there being no corrupt confideration herein, but only as is for the good of the public. So also bonds to fign, when the patron's fon come to canonical age, are le upon the reason before given, that the father is bound to vide for his fon (f). 7. Laftly, general bonds to refign a patron's request are held to be legal (g): for they may po be given for one of the legal confiderations before-mention and where there is a possibility that a transaction may be the law will not suppose it iniquitous without proof. if the party can prove the contract to have been a co one, fuch proof will be admitted, in order to shew the fimoniacal, and therefore void. Neither will the patro fuffered to make an ill use of such a general bond of ret tion; as by extorting a composition for tithes, procur annuity for his relation, or by demanding a refignation tonly or without good cause, such as is approved by the as, for the benefit of his own fon, or on account of no fidence, plurality of livings, or gross immorality in t cumbent (h).

⁽a) Cro. Eliz. 686. Moor. 916. (b) 3 Inft. 154. Cro. lac (c) Noy. 142. (d) Stra. 354 (e) Cro. Car. (f) Cro. Jac. 248. 274. (g) Cro. Car. 180. Stra.

⁽f) Cro Jac. 248. 274. (g) Cro. Car. 186 (h) 1 Vern. 411. 1 Equ. Caf. abr. 86, 87. Stra. 534.

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V. THE next kind of forfeitures are those by breach or on-performance of a condition annexed to the estate, either pressly by deed at its original creation, or impliedly by from a principle of natural reason. Both which we condered at large in a former chapter (i).

VI. I, THEREFORE now proceed to another species of forinre, viz. by waste. Waste, vastum, is a spoil or denction in houses, gardens, trees, or other corporeal heretaments, to the disherison of him that hath the remainder reversion in fee-simple or fee-tail (k).

WASTE is either voluntary, which is a crime of commifm, as by pulling down a house; or it is permissive, which amatter of omission only, as by suffering it to fall for want necessary reparations. Whatever does a lasting damage to efreehold or inheritance is waste (1). Therefore removing infcot, floors, or other things once fixed to the freehold a house, is waste (m). If a house be destroyed by temt, lightning, or the like, which is the act of Providence, is no waste: but otherwise, if the house be burnt by the releffness or negligence of the lesse; though now by the tute 6 Ann. c. 31. no action will lie against a tenant for an adent of this kind. Waste may also be committed in ponds, we-houses, warrens, and the like; by so reducing the numof the creatures therein, that there will not be fufficient the reversioner when he comes to the inheritance (n). Timis also part of the inheritance (o). Such are oak, ash, and n in all places: and in some particular countries, by local flom, where other trees are generally used for building, ey are thereupon confidered as timber; and to cut down th trees, or top them, or do any other act whereby the ther may decay, is waste (p). But underwood the tenant VOL. II.

⁽¹⁾ See chap. 10. pag. 152. (k) Co. Litt. 53. (1) Hetl. (m) 4 Rep. 64. (n) Co. Litt. 53. (o) 4 Rep. (p) Co, Litt. 53.

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may cut down at any feafonable time that he pleases (q); may take fufficient eftovers of common right for houseand cart-bote; unless restrained (which is usual) by particular covenants or exceptions (r). The conversion of land fi one species to another is waste. To convert wood, mead or pasture, into arable; to turn arable, meadow, or past into woodland; or to turn arable or woodland into pasts are all of them waste (s). For, as fir Edward Coke ferves (t), it not only changes the course of husbandry, the evidence of the estate; when such a close, which is a veyed and described as pasture, is found to be arable, ar converso. And the same rule is observed, for the same fon, with regard to converting one species of edifice into a ther, even though it is improved in its value (u). Too the land to fearch for mines of metal, coal, &c. is waste; that is a detriment to the inheritance (w): but, if the pit mines were open before, it is no waste for the tenant to tinue digging them for his own use (x); for it is now bed the mere annual profit of the land. These three are the neral heads of waste, viz. in houses, in timber, and in l Though, as was before faid, whatever tends to the deft tion, or depreciating the value, of the inheritance, is of dered by the law as waste.

LET us next see, who are liable to be punished for a mitting waste. And by the feodal law, feuds being a nally granted for life only, we find that the rule was get for all vasals or feudatories; if suasallus feudum dissipate aut insigni detrimento deterius fecerit, privabitur (But in our antient common law the rule was by no mean large: for not only he that was seised of an estate of intance might do as he pleased with it, but also waste was punishable in any tenant, save only in three persons; guan

⁽q) 2 Roll. Abr. 817. (1) Co.Litt. 41. (s) Hob. (t) 1 Inft. 53. (u) 1 Lev. 309. (w) 5 Rep. 12. Hob. 295. (y) Wright. 44.

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divalry, tenant in dower, and tenant by the curtefy (z); Inot in tenant for life or years (a). And the reason of the effty was, that the estate of the three former was created the act of the law itself, which therefore gave a remedy infthem: but tenant for life, or for years, came in by the meand lease of the owner of the fee, and therefore he might eprovided against the committing of waste by his lesse; lif he did not, it was his own default. But, in favour of owners of the inheritance, the statutes of Maribridge(b) Glocester (c) provided, that the writ of waste shall not lie against tenants by the law of England, (or curtefy) hose in dower, but against any farmer or other that holds my manner for life or years. So that, for above five hunlyears past, all tenants for life, or for any less estate, have apunishable or liable to be impeached for waste, both voary and permissive; unless their leases be made, as somesthey are, without impeachment of waste, absque impetievasti; that is, with a provision or protection that no man limpetere, or fue him, for waste committed.

the punishment for waste committed was, by common law the statute of Marlbridge, only single damages (d); except tease of a guardian, who also forfeited his wardship (e) by provisions of the great charter (f); but the statute of other directs, that the other four species of tenants shall and forfeit the place wherein the waste is committed, and treble damages, to him that hath the inheritance. The office of the statute is, "he shall forfeit the thing which shath wasted;" and it hath been determined, that under two two the place is also included (g). And if waste be a sparsim, or here and there, all over a wood, the whole defall be recovered; or if in several rooms of a house, whole house shall be forfeited (h); because it is impracticated by the reversioner to enjoy only the identical places wasted, when

It was however a doubt whether waste was punishable at the mon law in tenant by the curtefy. Regist. 72. Bro. Abr. tit. 4.88.2 Inst. 301. (a) 2 Inst 299. (b) 52 Hen III. c. (c) 6. Edw. I. c. 5. (d) 2 Inst. 146. (e) Ibid. 300. Hen, III. c. 4. (g) 2 Inst. 303. (h) Co Litt.

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when lying interspersed with the other. But if wastebe only in one end of a wood (or perhaps in one room of ah if that can be conveniently separated from the rest, that only is the locus vastatus, or thing wasted, and that only be forfeited to the reversioner (i).

VII. A SEVENTH species of forfeiture is that of co estates, by breach of the customs of the manor. Con estates are not only liable to the same forfeitures as those are held in focage, for treason, felony, alienation and whereupon the lord may feife them without any presen by the homage (k); but also to peculiar forfeitures, an to this species of tenure, which are incurred by the bre either the general customs of all copyholds, or the pe local customs of certain particular manors. And we m ferve that, as these tenements were originally holden lowest and most abject vasals, the marks of feodal do continue much the strongest upon this mode of pr Most of the offences which occasioned a resumption of by the feodal law, and were denominated feloniae, p vafallus amitteret feudum (1), still continue to be causes feiture in many of our modern copyholds. As, by fubt of fuit and fervice (m); fi dominum deservire noluerit disclaiming to hold of the lord, or swearing himself copyholder (o); fi dominum ejuravit, i. e. negavit fe a feudum habuere (p): by neglect to be admitted tenant a year and a day (q); si per annum et diem cessaveriti da investitura (r): by contumacy in not appea court after three proclamations (s); fi a domino to non comparuerit (t): or by refusing, when sworn of mage, to prefent the truth according to his oath (u); veritatem noverint, et dicant se nescire, cum sciant

⁽i) 2 Inft. 304. (k) 2 Ventr. 38. Cro. Eliz. 499. (l) I. 26. in ealc. (m) 3 Leon. 108. Dyer. 211. (n) I. 1. 21. (o) Co. Copyh. §. 57. (p) Feud. l. 2. 1. 34. 6 l. (q) Plowd. 372. (r) Feud. l. 2. 1. 22. (s) 8. Co. Copyh. §. 57. (t) Feud. l. 2. 1. 22. (u) Co. S. 57. (w) Feud. l. 2. 1. 28.

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and a variety of other cases, which it is impossible here immerate, the forfeiture does not accrue to the lord till the offences are presented by the homage, or jury of the scourt baron (x); per laudamentum parium suorum (y): sit is more fully expressed in another place (z), nemo midmatur de possessione sui beneficii, nisi convicta culpa, quae madanda (a) per judicium parium suorum.

III. the eighth and last method, whereby lands and tenes may become forfeited, is that of bankruptcy, or the act moming a bankrupt: which unfortunate person may, the several descriptions given of him in our statute law, as defined; a trader, who secretes himself, or does cerother acts, tending to defraud his creditors.

the shall be such a trader, or what acts are sufficient to minate him a bankrupt, with the several connected consers resulting from that unhappy situation, will be better dered in a subsequent chapter; when we shall endeavour solly to explain its nature, as it most immediately relates as and goods and chattels. I shall only here observe the per in which the property of lands and tenements are sterred, upon the supposition that the owner of them is by and indisputably a bankrupt, and that a commission and an arrangement of them is a several commission and the sawarded and issued against him.

when a man is declared a bankrupt, shall have full power spose of all his lands and tenements, which he had in his right at the time when he became a bankrupt, or which descend or come to him at any time afterwards, before his sare satisfied or agreed for; and all lands and tenements awere purchased by him jointly with his wife or children

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Co. Copyh § 58. (y) Feud. l. 1. t. 21. (2) Ibid. t. (2) i. e. arbitranda, definienda. Du Fresne. IV. 79.

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to his own use, (or such interest therein as he may lawf part with) or purchased with any other person upon se trust for his own use; and to cause them to be appraise their full value, and to fell the fame by deed indented and in led, or divide them proportionably among the creditors. I statute expressly included not only free, but copyhold, lar but did not extend to estates-tail, farther than the bankru life; nor to equities of redemption on a mortgaged ef wherein the bankrupt has no legal interest, but only ane table reversion. Whereupon the statute 21 Jac. I. c. enacts, that the commissioners shall be impowered to se convey, by deed indented and inrolled, any lands or to ments of the bankrupt, wherein he shall be seised of an tate-tail in possession, remainder, or reversion, unless the mainder or reversion thereof shall be in the crown; and fuch fale shall be good against all such issues in tail, rem dermen, and reversioners, whom the bankrupt himself m have barred by a common recovery, or other means: that all equities of redemption upon mortgaged estates, be at the disposal of the commissioners; for they shall power to redeem the fame, as the bankrupt himself m have done, and after redemption to fell them. And all this and a former act (b), all fraudulent conveyances to feat the intent of these statutes are declared void; but the purchasor bona side, for a good or valuable considera shall be affected by the bankrupt laws, unless the commi be fued forth within five years after the act of bankru committed.

By virtue of these statutes a bankrupt may lose all his estates; which may at once be transferred by his missioners to their assignees, without his participation or sent.

(b) i Jac. I. c. 15.

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CHAPTER THE NINETEENTH.

OF TITLE BY ALIENATION.

HE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or whase in its limited sense: under which may be comprized symethod wherein estates are voluntarily resigned by one an, and accepted by another; whether that be effected by be, gift, marriage settlement, devise, or other transmission ippoperty by the mutual consent of the parties.

This means of taking estates, by alienation, is not of equal iquity in the law of England with that of taking them by tent. For we may remember that, by the feodal law (a), pure and genuine feud could not be transferred from one datory to another without confent of the lord; left thereby beble or fuspicious tenant might have been substituted and posed upon him, to perform the feodal services, instead of on whose abilities and fidelity he could depend. Neither ld the feudatory then subject the land to his debts; for, if might, the feodal restraint of alienation would have been ly frustrated and evaded (b). And, as he could not aliene his life-time, so neither could he by will defeat the succesby devising his feud to another family: nor even alter the meef it, by imposing particular limitations, or prescribing unufual path of descent. Nor, in short, could he aliene the te, even with the consent of the lord, unless he had also ained the consent of his own next apparent, or presumptive, (c). And therefore it was very usual in antient feoffments apress, that the alienation was made by consent of the N 4 heirs

1) See pag. 57. (b) Feud. 1. 1. 27. (c) Co. Litt. 9.

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heirs of the feoffor; or sometimes for the heir apparent him felf to join with the seoffor in the grant (d). And, on the other hand, as the feodal obligation was looked upon to be recipro cal, the lord could not aliene or transfer his figniory withou the confent of his vafal: for it was esteemed unreasonable fubject a feudatory to a new fuperior, with whom he migh have a deadly enmity, without his own approbation; or eve to transfer his fealty, without his being thoroughly apprize of it, that he might know with certainty to whom his render and fervices were due, and be able to distinguish a lawf diffress for rent from a hostile seinn of his cattle by the lor of a neighbouring clan (e). This confent of the vafal wa expressed by what was called attorning (f), or professing become the tenant of the new lord; which doctrine of atten ment was extended to all leffees for life or years. For if or bought an estate with any lease for life or years standing of thereon, and the leffee or tenant refused to attorn to thepu chasor, and to become his tenant, the grant or contract w in most cases void, or at least incomplete (g): which w also an additional clog upon alienations.

But by degrees this feodal severity is worn off; and exprience, hath shewn, that property best answers the purposes civil life, especially in commercial countries, when its transfand circulation are totally free and unrestrained. The roadw cleared in the first place by a law of king Henry the first, whi allowed a man to sell and dispose of lands which he himself he purchased; for over these he was thought to have a more tensive power, than over what had been transmitted to himse course of descent from his ancestors (h): a doctrine, which countenant

⁽d) Madox. Formul. Angl. No. 316, 319, 427. (e) Gi
Ten. 75. (f) The same doctrine and the same denominat
prevailed in Bretagne—possession jurisdictionalibus non all
apprehends posses, quam per attournances et awirances, ut loqui solt
cum wasallus, ejurato prioris domini ebsequio et side, nowo se sa
mento nowo item domino acquirenti obstringebat; idque justu aucho
D'Argentre Antiq. Consuet. Brit. apud Du Fresne. i. 819, 81
(g) Litt. §. 551. (h) Emptiones wel acquisitiones suas det
magis welst. Terram autem quam ei parentes dederunt, non mit
extra cognationem suam. LL. Hen. I. c. 70.

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countenanced by the feodal constitutions themselves (j): but he was not allowed to fell the whole of his own acquirements, has totally to difinherit his children, any more than he was at liberty to aliene his paternal estate (i). Afterwards a man fems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his assigns by name; but, if his assigns were not specified in the purchase deed, he was not empowered to aliene (k): and also he might part with one fourth of the inheritance of his ancestors without the consent of his heirs (1). By the great charter of Henry III. (m), no fubinfeudation was permitted of part of the and, unless sufficient was left to answer the services due to he superior lord, which sufficiency was interpreted to be one half or moiety of the land (n). But these restrictions were in general removed by the statute of quia emptores (o), whereby all persons, except the king's tenants in capite, were left at liberty to aliene all or any part of their lands at their own difgetion (p). And even these tenants in capite were by the fatute 1 Edw. III. c. 12. permitted to aliene, on paying a fine to the king (q). By the temporary statutes 7 Hen. VII. 13. and 3 Hen. VIII. c. 4. all persons attending the king in his wars were allowed to aliene their lands without licence, and were relieved from other feodal burdens. And, lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24. As to the power of charging lands with the debts of the owner, his was introduced so early as statute Westin. 2. which (r) subjected a moiety of the tenant's lands to executions, for lebts recovered by law; as the whole of them was likewise subjected to be pawned in a statute-merchant by the statute de mercatoribus, made the same year, and in a statute staple by N 5

⁽i) Si questum tantum habuerit is, qui partem terrae suae donare voluerit, tunc quidem boc ei licet; sed non mum questum, quia non potest filium suum haeredem exhaeredare. Glavil. t 7. c. 1. (k) Mirr. c. 1. § 3. This is also borrowed from the seodal law. Feud. l. 2. t. 48. (l) Mirr. ibid. (m) 9 Hen. III. c. 32. (n) Dalrymple of seuds 95. (o) 18 Edw. I. c. 1. (p) See pag. 72. (q) 2 Inst. 67. (r) 13 Edw. I. c. 18.

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ftatute 27 Edw. III. c. 9. and in other similar recognizance by statute 23 Hen. VIII. c. 6. And, now, the whole of them is not only subject to be paramed for the debts of the owner, but likewise to be absolutely fold for the benefit of trade and commerce by the several statutes of bankrupter. The restraint of devising lands by will, except in some place by particular custom, lasted longer; that not being totally moved, till the abolition of the military tenures. The dostrin of attornments continued still later than any of the rest, and became extremely troublesome, though many methods we invented to evade them; till, at last, they were made no longe necessary, by statutes 4 & 5 Ann. c. 16 and 11 Geo. II. c. 19.

In examining the nature of alienation, let us first enquire briefly, who may aliene and to whom; and then, more largely how a man may aliene, or the several modes of conveyance.

I. Who may aliene, and to whom; or, in other word who is capable of conveying, and who of purchasing. An herein we must consider rather the incapacity, than capacit of the several parties: for all persons in possession are, prim facie, capable both of conveying and purchasing, unless the law has laid them under any particular disabilities. But, a man has only in him the right of either possession or pro perty, he cannot convey it to any other, lest pretended tid might be granted to great men, whereby justice might l trodden down, and the weak oppressed (s). Yet reversion and vefted remainders may be granted; because the possession of the particular tenant is the possession of him in reverse or remainder; but contingencies, and mere possibilities, though they may be released, or devised by will, or may pass to t heir or executor, yet cannot (it hath been faid) be affign to a stranger, unless coupled with some present interest (f)

PERSONS attainted of treason, felony, and praemunirea incapable of conveying, from the time of the offence committee provide

⁽a) Co. Litt. 214. (f) Sheppard's touchstore, 238, 239, 32 11 Med. 152. 1 P. Wms. 574. Stra. 132.

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provided attainder follows (t): for fuch conveyance by them may tend to defeat the king of his forfeiture, or the lord of his escheat. But they may purchase for the benefit of the movn, or the lord of the fee, though they are disabled to bold: the lands so purchased, if after attainder, being subject to immediate screening; if before, to escheat as well as forfeiture, according to the nature of the crime (u). So also corporations, religious or others, may purchase lands; yet, unless they have a licence to hold in mortmain, they cannot reain such purchase; but it shall be forfeited to the lord of the see.

IDIOTS and persons of nonsane memory, infants and perons under dures, are not totally disabled either to convey rpurchase, but fub modo only. For their conveyances and purchases are voidable, but not actually void. The king inded, on behalf of an idiot, may avoid his grants or other alls (w). But it hath been faid, that a non compos himself, hough he be afterwards brought to a right mind, shall not epermitted to allege his own infanity in order to avoid fuch rant: for that no man shall be allowed to stultify himself, rplead his own disability. The progress of this notion is mewhat curious. In the time of Edw. I. non compos was infficient plea to avoid a man's own bond (x): and there is writ in the register (y) for the alienor himself to recover and aliened by him during his infanity; dum fuit non comumentis suae, ut dicit, &c. But under Edward III. a scrule began to arise, whether a man should be permitted to lmiß himself, by pleading his own infanity (z): and, afawards, a defendant in affife having pleaded a release by the laintiff since the last continuance, to which the plaintiff refled (ore tenus, as the manner then was) that he was out of is mind when he gave it, the court adjourned the affife; bubting, whether as the plaintiff was fane both then and at he commencement of the fuit, he should be permitted to plead mintermediate deprivation of reason; and the question was asked

⁽t) Co. Litt. 42. (u) Ibid. 2. (w) Ibid 2 47. (x) Bit-In. c. 28. fol. 66. (y) fol. 228. (2) 5 Edw. III. 70.

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asked, how he came to remember the release, if out of h senses when he gave it (a). Under Henry VI. this way reasoning (that a man shall not be allowed to disable himse by pleading his own incapacity, because he cannot kno what he did under fuch a fituation) was ferioufly adopted the judges in argument (b); upon a question, whether t heir was barred of his right of entry by the feoffment of h infane ancestor. And from these loose authorities, whi Fitzherbert does not scruple to reject as being contrary reason (c), the maxim that a man shall not stultify himse hath been handed down as fettled law (d): though later or nions, feeling the inconvenience of the rule, have in ma points endeavoured to restrain it (e). And, clearly, thene heir, or other person interested, may, after the death of idiot or non compos, take advantage of his incapacity a avoid the grant (f). And so too, if he purchases under the difability, and does not afterwards upon recovering fenses agree to the purchase, his heir may either waive or cept the estate at his option (g). In like manner, an infa may waive fuch purchase or conveyance, when he comes full age; or, if he does not then actually agree to it, heirs may waive it after him (h). Persons also, who per chase or convey under dures, may affirm or avoid such tra action, whenever the durefs is ceased (i). For all thefe under the protection of the law; which will not fuffer th to be imposed upon, through the imbecility of their prel condition; fo that their acts are only binding, in case t be afterwards agreed to, when fuch imbecility ceases.

THE case of a seme-covert is somewhat different. Shen purchase an estate without the consent of her husband, and conveyance is good during the coverture, till he avoids it by season declaring his differt (k). And, though he does nothing

⁽a) 35 Ass. fil. 10 (b) 39 Hen. VI. 42. (c) F. N. B 2 (d) Litt. § 405. Cro. Eliz. 398. 4. Rep. 123. (e) Co. 469. 3. Mod. 310, 311. 1 Equ. cas. abr. 279 (1) Perk. §. 21. (g) Co. Litt. 2. (h) Ibid. (i) 2 Inst. 483. Rep. 119. (k) Co. Litt. 3.

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proid it, or even if he actually consents, the feme-covert befelf may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if the dies before her husband, or if in her widowhood she does nothing to express her consent or agreement (1). But the conveyance or other contract of a seme-covert (except by some matter of record) is absolutely void, and not merely midable (m); and therefore cannot be affirmed or made good by any subsequent agreement.

THE case of an alien born is also peculiar. For he may purchase any thing; but after purchase he can bold nothing, accept a lease for years of a house for convenience of merchandize, in case he be an alien-friend: all other purchases (when found by an inquest of office) being immediately forfeited to the king (n).

Papists, lastly, and persons professing the popish relition, are by statute 11 & 12 W. III. c. 4. disabled to purhaseany lands, rents, or hereditaments; and all estates made otheir use, or in trust for them, are void. But this statute sconstrued to extend only to papists above the age of eighten; such only being absolutely disabled to purchase: yet he next protestant heir of a papist under eighteen shall have the profits, during his life: unless he renounces his errors uring the time limited by law (0).

II. We are next, but principally, to enquire, bow a man my aliene or convey; which will lead us to confider the teral modes of conveyance.

In consequence of the admission of property, or the giving separate right by the law of society to those things which the law of nature were in common, there was necessarily me means to be devised, whereby that separate right or exhive property should be originally acquired; which, we are more than once observed, was that of occupancy or stipossession. But this possession, when once gained, was

⁽n) Perkins. §. 154. 1 Sid. 120. (n) Co. Litt. 2.

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also necessarily to be continued; or else, upon one man's de reliction of the thing he had feifed, ht would again become common, and all those mischiefs and contentions would en fue, which property was introduced to prevent. For the purpose therefore, of continuing the possession, the muni cipal law has established descents and alienations: the forme to continue the poslession in the heirs of the proprietor, after his involuntary dereliction of it by his death; the latter to continue it in those persons, to whom the proprietor, by hi own voluntary act, shall choose to relinquish it in his life-time A translation, or transfer, of property being thus admitte by law, it became necessary that this transfer should be pro perly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all; or con cerning the persons, by whom and to whom it was tran ferred; or with regard to the subject matter, as what the thin transferred confifted of; or, lastly, with relation to t mode and quality of the transfer, or for what period time (or, in other words, for what estate and interest) t conveyance was made. The legal evidences of this trans tion of property are called the common affurances of the kin dom, whereby every man's estate is assured to him, and controversies, doubts, and difficulties are either prevent or removed.

THESE common affurances are of four kinds: 1. By me ter in pais, or deed; which is an affurance transacted betwee two or more private persons in pais, in the country; that (according to the old common law) upon the very spot to transferred. 2. By matter of record, or an affurance transacted only in the king's public courts of record. 3. By secial custom, obtaining in some particular places, and reling only to some particular species of property. Whethere are such as take effect during the life of the party of veying or assuring. 4. The fourth takes no effect, till as his death; and that is by devise, contained in his last wand testament. We shall treat of each in its order.

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CHAPTER THE TWENTIETH. But a length invent. , only list con

OF ALIENATION BY DEED.

Ntreating of deeds, I shall consider, first, their general nature; and next, the several forts or kinds of deeds, in their respective incidents. And in explaining the former, hall examine, first, what a deed is; fecondly, its requiis; and, thirdly, how it may be avoided,.

LFIRST then, a deed is a writing sealed and delivered by e parties (a). It is sometimes called a charter, carta, mits materials; but most usually, when applied to the mactions of private subjects, it is called a deed, in Latin ulum, κατ' εξοχην, because it is the most solemn and aumic act that a man can possibly perform, with relation to edisposal of his property; and therefore a man shall alus be estopped by his own deed, or not permitted to aver prove any thing in contradiction to what he has once fo emply and deliberately avowed (b). If a deed be made more parties than one, there ought to be regularly as my copies of it as there are parties, and each should be torindented (formerly in acute angles instar dentium, but present in a waving line) on the top or side, to tally or respond with the other; which deed, so made, is called indenture. Formerly, when deeds were more concise than present, it was usual to write both parts on the same piece parchment, with some word or letters of the alphabet itten between them; through which the parchment was ther in a strait or indented line, in such a manner bleave half the word on one part and half on the other.

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Deeds thus made were denominated fyngropha by the canonife (c): and with us chirographa, or hand-writings (d); t word cirographum or cyrographum being ufually that whi was divided in making the indenture : and this custom is st preserved in making out the indentures of a fine, where But at length indenting only has come into u without cutting through any letters at all; and it feems present to serve for little other purpose, than to give name the species of the deed. When the several parts of an inde ture are interchangeably executed by the feveral parties, the part or copy which is executed by the grantor is usually call the original, and the rest are counterparts: though of late is most frequent for all the parties to execute every par which renders them all originals. A deed made by one par only is not indented, but polled or shaved quite even: a is therefore called a deed-poll, or a fingle deed (e).

II. We are in the next place to consider the requisiter a deed. The first of which is, that there be persons a to contract and be contracted with, for the purposes intend by the deed; and also a thing, or subject matter to be a tracted for; all which must be expressed by sufficient nat (f). So as in every grant there must be a grantor, or gratee, and a thing granted; in every lease a lessor, a less and a thing demised.

SECONDLY; the deed must be founded upon good sufficient consideration. Not upon an usurious contract (nor upon fraud or collusion, either to deceive purchabona side (h), or just and lawful creditors (i); any of w bad considerations will vacate the deed. A deed also other grant, made without any consideration, is, as it w of no effect; for it is construed to enure, or to be effect only to the use of the grantor himself (k). The consideration

⁽c) Lyndew. l. t. t. 10. c. 1 (d) Mirror. c. 2. §. 27. (e) Litt. § 371, 372. (f) Co. Litt. 35. (g) Stat. 13. Eliz. (h) Stat. 27 Eliz. c. 4. (i) Stat. 13. Eliz. c. 5. (k) §. 533.

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mybe either a good, or a valuable one. A good confiderain is such as that of blood, or of natural love and affection,
then a man grants an estate to a near relation; being founded
amotives of generosity, prudence, and natural duty: a
hable consideration is such as money, marriage, or the
ke, which the law esteems an equivalent given for the grant
h; and is therefore founded in motives of justice. Deeds,
ade upon good consideration only, are considered merely
diuntary, and are frequently set aside in favour of crediare and bona side purchasors.

THIRDLY; the deed must be written, or I presume inted; for it may be in any character or language; but it of be upon paper, or parchment. For if it be written on me, board, linen, leather, or the like, it is no deed (m). food or stone may be more durable, and linen less liable to fires; but writing on paper or parchment unites in itself, meperfectly than any other way, both those defireable quais: for there is nothing else so durable, and at the same ne so little liable to alteration; nothing so secure from alte-tion, that is at the same time so durable. It must also have regular stamps, imposed on it by the several statutes for encrease of the public revenue; else it cannot be given widence. Formerly many conveyances were made by paor word of mouth only, without writing; but this giving andle to a variety of frauds, the statute 29 Car. II. c. 3. tels, that no lease or estate in lands, tenements, or hereaments, (except leases, not exceeding three years from the king, and whereon the referved rent is at least two thirds the real value) shall be looked upon as of greater force ma lease or estate at will; unless put in writing, and signed the party granting, or his agent lawfully authorized in iting.

FOURTHLY; the matter written must be legally and or
fifet forth: that is there must be words sufficient to

tify the agreement and bind the parties: which sufficiency

must

^{(1) 3} Rep. 83. (m) Co. Litt. 229. F. N. B. 122.

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must be left to the courts of law to determine (n). For it is not absolutely necessary in law, to have all the formal part that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effect that manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefor I will here mention them in their usual (0) order.

- 1. The premises may be used to set forth the number an names of the parties, with their additions or titles. The also contain the recital, if any, of such deeds, agreement or matters of fact, as are necessary to explain the reason upon which the present transaction is founded; and here also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, an thing granted (p).
- 2. 3. NEXT come the babendum and tenendum (q). The office of the babendum is properly to determine what estated interest is granted by the deed: though this may be perform ed, and sometimes is performed, in the premises. In which case the habendum may lessen, enlarge, explain, or qualify but not totally contradict or be repugnant to, the estate grant ed in the premises. As if a grant be " to A and the heirs "his body," in the promises, habendum "to him and h " heirs for ever," or vice versa; here A has an estate-ta and a fee-simple expectant thereon (r). But, had it been the premises " to him and his heirs," habendum " to him f " life," the habendum would be utterly void (a); for an effa of inheritance is vested in him before the habendum comes, an shall not afterwards be taken away, or divested, by it. T tenendum, "and to hold," is now of very little use, and is on ke

⁽n) Co. Litt 225. (o) Ibid. 6. (p) See appendix, No. § 2. pag. 5. (q) Ibid. (r) Co. Litt. 21. 2 Roll. Rep. 1 23 Cro. Jac. 476. (s) 2 Rep. 23. 8 Rep. 56.

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keptin by custom. It was sometimes formerly used to signify the tenure, by which the estate granted was to be holden; with the estate granted was to be holden; with the estate granted was to be holden; with the service of the servi

4. NEXT follow the terms or stipulations, if any, upon which the grant is made: the first of which is the reddendum or refervation, whereby the grantor doth create or referve bme new thing to himself out of what he had before granted. As "repdering therefore yearly the fum of ten shillings, or a "pepper corn, or two days ploughing, or the like (u)." Under the pure feodal system, this render, reditus, return, or ent, confifted in chivalry principally of military fervices; in villenage, of the most slavish offices; and, in socage, it usually confifts of money, though it may confift of services still, wof any other certain profit (w). To make a reddendum ood, if it be of any thing newly created by the deed, the reevation must be to the grantors, or some, or one of them, and not to any stranger to the deed (x). But if it be of anient services or the like, annexed to the land, then the reseration may be to the lord of the fee (y).

5. ANOTHER of the terms upon which a grant may be made is a condition; which is a clause of contingency, on the appening of which the estate granted may be defeated; as 'provided always, that if the mortgagor shall pay the mort-

" gagee

(1) Append No. I. Madox. Formul. passim. (w) See pag. 41. Rep. 71. (y) Append. No. I. pag. i.

(u) Append. (x) Plowd. 13.

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"gagee 500 l. upon such a day, the whole estate granted hall determine;" and the like (z).

6. NEXT may follow the clause of warranty; whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted (a). By the feodal constitution, if the vasal's title to enjoy the feud was disputed, he might vouch, or call, the lord or donor to warrant or iffue his gift; which if he failed to do, and the vafal was evicted, the lord was bound to give him another feud of equal value in recompense (b). And so, by our antient law, if before the statute of quia emptores a man enfeoffed another in fee, by the feodal verb dedi, to hold of himself and his heirs by certain fervices; the law annexed a warranty to this grant, which bound the feoffer and his heirs, to whom the fervices (which were the confideration and equivalent for the gift) were onginally stipulated to be rendered (c). Or if a man and his anceftors had immediately holden land of another and his anceftors by the fervice of homage (which was called homage auncestrel) this also bound the lord to warranty (d); the ho , mage being an evidence of fuch a feodal grant. And, upon fimilar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of hi share, the other and his heirs are bound to warranty (e), be cause they enjoy the equivalent. And so, even at this day upon a gift in tail or lease for life, rendering rent, the done or leffor and his heirs (to whom the rent is payable) are boun to warrant the title (f). But in a feoffment in fee by the ver dedi, fince the statute of quia emptores, the feoffer only bound to the implied warranty, and not his heirs (g); becau it is a mere personal contract on the part of the feoffor, the to nure (and of course the antient services) resulting back to t fuperior lord of the fee. And in other forms of alienation gradually introduced fince that statute, no warranty whats

⁽²⁾ Append. No. II. §. 2. pag. viii. (a) Ibid. No. I. pag. (b) Feud. l. 2. t. 8. & 25. (c) Co. Litt. 284. (d) Lit. §. 143. (e) Co. Litt. 174. (f) Ibid. 384. (g) Ibid.

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ever is implied (h); they bearing no fort of analogy to the original feodal donation. And therefore in such cases it became necessary to add an express clause of warranty, to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb warrantize or warrant (i).

THESE express warranties were introduced, even prior to the statute of quia emptores, in order to evade the strictness of the feodal doctrine of non-alienation without the confent of the heir. For though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet, if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir insured the grantee; not so much by confirming his title, as by obliging fuch heir to yield him a recompense in land of equal vahe: the law, in favour of alienations, supposing that no anceftor would wantonly difinherit his next of blood (k); and therefore prefuming that he had received a valuable confideration, either in land, or in money which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee-simple to one who was already in possession, and superadded a warranty to his deed, it was held that fuch warranty not only bound the warrantor himself to protect and affure the title of the warrantee, but it also bound his heir: and this, whether that warranty was lineal, or collateral to the title of the land. Lineal warranty was where the heir derived, or might by pofshility have derived, his title to the land warranted, either from or through the ancestor who made the warranty; as, where a father, or an elder fon in the life-time of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger fon (1). Collateral warranty was where the heir's title to the land neither was,

⁽h) Co. Litt. 102. (i) Litt. §. 733. (k) Co. Litt. 373. (l) Litt. § 703. 706, 707.

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was, nor could have been, derived from the warranting ancestor; as, where a younger brother released to his father disseisor, with warranty, this was collateral to the elder brother (m). But where the very conveyance, to which the warranty was annexed, immediately followed a disseisin, or operated itself as such (as, where a father tenant for years, with remainder to his son in fee, aliened in fee-simple with warranty) this, being in its original manifestly sounded on the tor or wrong of the warrantor himself, was called a warrant commencing by disseisin; and, being too palpably injurious to be supported, was not binding upon any heir of such tortion warrantor (n).

In both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him othe lands in their stead) was only on condition that he had other fufficient lands by descent from the warranting ancestor (o) But though, without affets, he was not bound to infure the title of another, yet, in case of lineal warranty, whether a fets descended or not, the heir was perpetually barred from claiming the land himself; for if he could succeed in suc claim, he would then gain affets by descent (if he had the not before) and must fulfil the warranty of his ancestor: an the same rule (p) was with less justice adopted also in respe of collateral warranties, which likewife (though no affets de scended) barred the heir of the warrantor from claiming the land by any collateral title; upon the presumption of la that he might hereafter have affets by descent either from through the same ancestor. The inconvenience of this latt branch of the rule was felt very early, when tenants by the curtefy took upon them to aliene their lands with warranty which collateral warranty of the father descending upon h fon (who was the heir of both his parents) barred him fro claiming his maternal inheritance: to remedy which the ft tute of Glocester, 6 Edw. I. c. 3. declared, that such warran should be no har to the fon, unless affets descended fromt father. It was afterwards attempted in 50 Edw. III. to ma

⁽m) Litt. §. 705. 707. (n) 1bid. §. 698. 702. (0) (1) Litt. 102. (p) Litt. §. 711, 712.

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he same provision universal, by enacting that no collateral garanty should be a bar, unless where assets descended from lesame ancestor (q); but it then proceeded not to effect. Howrer, by the statute 11 Hen. VII. c. 20. notwithstanding any fenation with warranty by tenant in dower, the heir of the aband is not barred, though he be also heir to the wife. indby statute 4 & 5 Ann. c. 16. all warranties by any tenant wife shall be void against those in remainder or reversion; mall collateral warranties by any ancestor who has no estate finheritance in possession shall be void against his heir. By ewording of which last statute it should seem, that the leflature meant to allow, that the collateral warranty of teat in tail, descending (though without assets) upon a reainder-man or reversioner, should still bar the remainder or retion. For though the judges, in expounding the statute danis, held that, by analogy to the statute of Glocester, a real warranty by the tenant in tail without affets should not rthe issue in tail, yet they held such warranty with affets be a fufficient bar (r): which was therefore formerly menmed (s) as one of the ways whereby an estate tail might be stroyed; it being indeed nothing more in effect, than exanging the lands entailed for others of equal value. They 6 held that collateral warranty was not within the statute donis; as that act was principally intended to prevent the mant in tail from disinheriting his own issue; and therefore llateral warranty (though without affets) was allowed to be, at common law, a sufficient bar of the estate-tail and all mainders and reversions expectant thereon (t). And so it ntinues to be, notwithstanding the statute of queen Anne, made by tenant in tail in possession: who therefore may now, thout the forms of a fine or recovery, in some cases make good conveyance in fee-simple, by superadding a warranty his grant; which, if accompanied with affets bars his own le, and without them bars such of his heirs as may be in mainder or reversion. and bend the fraduction

7. AFTER

⁽r) Litt. §. 712. 2 Inst. 293. (r) pag. (t) Co. Litt. 374. 2 Inst. 335.

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- 7. AFTER warranty usually follow covenants, or conv tions; which are clauses of agreement contained in a de whereby either party may stipulate for the truth of cer facts, or may bind himself to perform, or give, somethin the other. Thus the grantor may covenant that he ha right to convey; or for the grantee's quiet enjoyment the like: the grantee may covenant to pay his rent, or the premises in repair, &c. (v). If the covenantor coven for himself and his beirs, it is then a covenant real, and fcends upon the heirs; who are bound to perform it, vided they have affets by descent, but not otherwise: covenants also for his executors and administrators, his pe nal affets, as well as his real, are likewife pledged for performance of the covenant; which makes such covena better fecurity than any warranty, and it has therefor modern practice totally superseded the other.
- 8. LASTLY, comes the conclusion, which mentions execution and date of the deed, or the time of its being g or executed, either expressly, or by reference to some and year before-mentioned (w). Not but a deed is good though it mention no date; or hath a false date; or even hath an impossible date, as the thirtieth of February; puded the real day of its being dated or given, that is, deliver can be proved (x).

deed; the reading of it. This is necessary, wherever at the parties desire it: and, if it be not done on his request deed is void as to him. If he can, he should read it him if he be blind or illiterate, another must read it to him. be readfalsely, it will be void; at least for so much as is recited: unless it be agreed by collusion that the deed be read false, on purpose to make it void; for in such of shall bind the fraudulent party (y).

SIXT

⁽u) Append. No. II. §. 2. pag. viii. (w) Ibid. pa (x) Co. Litt. 46. Dyer. 28. (y) 2 Rep. 3. 9. 11 Rep.

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SIXTHLY, it is requisite that the party, whose deed it is, fould feal, and in most cases I apprehend should fign it also. The use of seals, as a mark of authenticity to letters and other fruments in writing, is extremely antient. We read of it mong the Jews and Persians, in the earliest and most facred cords of history (z). And in the book of Jeremiah there is a ay remarkable instance, not only of an attestation by seal, ntalfo of the other usual formalities attending a Jewish purlase (a). In the civil law also (b), seals were the evidence of nth; and were required, on the part of the witnesses at of, at the attestation of every testament. But, in the times four Saxon ancestors, they were not much in use in England. or though fir Edward Coke (c) relies on an instance of king dwyn's making use of a seal about an hundred years before conquest, yet it does not follow that this was the usage mong the whole nation: and perhaps the charter he mentions ay be of doubtful authority, from this very circumstance, being sealed: since we are assured by all our antient histoins, that fealing was not then in common use. The method the Saxons was for fuch as could write to subscribe their mes, and, whether they could write or not, to affix the nof the cross: which custom our illiterate vulgar do, for emost part, to this day keep up; by signing a cross for eirmark, when unable to write their names. And indeed is inability to write, and therefore making a cross in its stead, honeftly avowed by Caedwalla a Saxon king, at the end of nof his charters (d). In like manner, and for the same unmountable reason, the Normans, a brave but illiterate Vol. II.

[1] 1 Kings. c. 21. Daniel. c. 6. Esther. c. 8. (a) "And I bought the feld of Hanameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence and seled it, and took witnesses, and weighed him the money in the billances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open." c. 32. (b) Inst. 2. 10. 33. (c) 1 Inst. 7. (d) "Propria manu pro ignorantia literarum signum sanctae crucis expresse et subscripsi." Id. Jan. Angl. 1. 1. §. 42. And this (according to Procepius) semperor Justin in the east, and Theodoric king of the Goths in also had before authorized by their example, on account of their thilly to write.

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nation, at their first settlement in France, used the practice fealing only, without writing their names : which cuftom co tinued, when learning made its way among them, though reason for doing it had ceased; and hence the charter of E ward the Confessor to Westminster abbey, himself bei brought up in Normandy, was witneffed only by his feal, a is generally thought to be the oldest sealed charter of any thenticity in England (e). At the conquest the Norm lords brought over into this kingdom their own fashions; introduced waxen feals only, instead of the English method writing their names, and figning with the fign of the cross The impressions of these seals were sometimes a knight horseback, sometimes other devices: but coats of arms w not introduced into feals, nor indeed into any other use, about the reign of Richard the first, who brought them fr the croifade in the holy land; where they were first inven and painted on the shields of the knights, to distinguish variety of persons of every christian nation who resorted ther, and who could not, when clad in complete steel otherwise known or ascertained.

This neglect of figning, and resting only upon the authicity of seals, remained very long among us; for it was in all our books that sealing alone was sufficient to authentica deed: and so the common form of attesting deeds.--"se" and delivered," continues to this day; notwithstanding statute 29 Car. II. c. 3. before-mentioned revives the sa custom, and expressly directs the signing, in all grants lands, and many other species of deeds: in which there signing seems to be now as necessary as sealing, though it been sometimes held that the one includes the other (g).

A SEVENTH requisite to a good deed is that it be delived by the party himself or his certain attorney: which therefor

⁽e) Lamb. Archeion. 51. (f) "Normanni chirograph" confessionem, cum crucibus aurcis, aliisque signaculis sacru Anglia sirmari solitam, in caeram impressam mutaut, modu scribendi Anglicum rejieiunt." Ingulpa. (g) 3 Lev. 1.

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also expressed in the attestation; "fealed and delivered." A deed takes effect only from this tradition or delivery; for, if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing (h), and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a deed, but as an escrow; that is, as a scrowl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes (i).

THE last requisite to the validity of a deed is the attestation, or execution of it in the presence of witnesses: though this is necessary, rather for preserving the evidence, than for constituting the effence, of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the brevia testata mentioned by the feodal writers (k); which were written memorandums, introduced to perpetuate the tenor of conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their figning their names (that not being always in their power) but they only heard the deed read; and then the clerk or scribe added their names, in a fort of memorandum, thus; " hijs tef-"tibus, Johanne Moore, Jacobo Smith, et aliis ad hanc rem con-"vocatis (1)." This, like all other folemn transactions, was originally done only coram paribus (m), and frequently when allembled in the court baron, hundred, or county court; which was then expressed in the attestation, teste comitatu, bundredo, &c. (n). Afterwards the attestation of other witneffes was allowed, the trial in case of a dispute being still re-0 2

⁽h) Perk. §. 130. (i) Co. Litt. 36. (k) Feud. l. 1. t. 4. (l) Co. Litt. 7. (m) Feud. l 2. t. 32. (n) Spelm. Gloff. 48. Madox. Formul. No. 221. 322. 660.

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ferved to the pares; with whom the witnesses (if more than one) were joined in the verdict (o): till that also was abrogated by the statute of York, 12 Edw. II. st. 1. c. 2. And in this manner, with some such clause of hijs testibas, are all old deeds and charters, particularly magna carta, witneffed, And, in the time of fir Edward Coke, creations of nobility were still witnessed in the same manner (p). But in the king's common charters, writs, or letters patent, the stile is now altered: for, at present, the king is his own witness, and attests his letters patent thus ; " tefte meipfo, witness ourself at West-" minster, &c." a form which was introduced by Richard the first (q), but not commonly used till about the beginning of the fifteenth century; nor the clause of bijs testibus entirely discontinued till the reign of Henry the eighth (r); which was also the aera of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever fince that time the witnesses have fubscribed their attestation, either at the bottom, or on the back, of the deed (s).

III. WE are next to confider, how a deed may be avoided or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the effential requifites before-mentioned; either, 1. Proper parties, and proper subject matter: 2. A good and sufficient consideration 3. Writing on paper or parchment, duly stamped : 4. Suffe cient and legal words, properly disposed : 5. Reading, if de fired, before the execution: 6. Sealing; and, by the statute in many cases figning also: or, 7. Delivery; it is a void deed ab initio. It may also be avoided by matter ex post facto: as 1. By rafure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation (t). 2. By breaking off, or de facing, the feal (u). 3. By delivering it up to be cancelled

⁽o) Co. Litt. 6. (p) 2 Inft. 77. \$15. (r) Ibid. Differt. fol. 32. (u) 5 Rep. 27.

⁽q) Madox. Formul. No. (s) 2 Inft. 78. (t) I

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that is to have lines drawn over it, in the form of lattice work or cancelli; though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as, the husband where a seme covert is concerned; an infant, or person under dures, when those disabilities are removed; and the like. 5. By the judgment or decree of a court of judicature. This was antiently the province of the court of star-chamber, and now of the chancery: when it appears that the deed was obtained by fraud, force, or other soul practice; or is proved to be an absolute forgery (w). In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those, which, from long practice and expenience of their essicacy, are generally used in the alienation of real estates: for it would be tedious, nay infinite, to descant upon all the several instruments made use of in personal conterns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to convey the property of lands and tenements from man to man, are commonly denominated conveyances: which are either conveyances at common law, or such as receive their force and essicacy by virtue of the state of uses.

I. OF conveyances by the common law, some may be called original, or primary conveyances; which are those by means whereof the benefit or estate is created or first arises: others are derivative or secondary; whereby the benefit or estate, originally created, is enlarged, restrained, transferred, or extinguished.

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ORIGINAL conveyances are the following; 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition: derivative are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeazance.

1. A FEOFFMENT, feoffamentum, is a substantive derived from the verb, to enfeosf, feoffare or infeudare, to give one a feud; and therefore feoffment is donatio feudi (x). It is the most antient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeosfs, is called the feoffor; and the person enfeosfed is denominated the feoffee.

This is plainly derived from, or is indeed itself the very mode of the antient feodal donation; for though it may be performed by the word "enfeoff" or grant," yet the apter word of feoffment is "do or dedi (y)." And it is still directed and governed by the same feodal rules; infomuch that the principal rule relating to the extent and effect of a feodal grant " tenor est qui legem dat feudo," is in other words become the maxim of our law with relation to feoffments, " modus legem " dat donationi (z)." And therefore as in pure feodal donations, the lord from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, " ne quis plus donasse praesumatur, quan " in donatione expresserit (a);" so, if one grants by feoffmen lands or tenements to another, and limits or expresses no estate the grantee (due ceremonies of law being performed) hat barely an estate for life (b). For, as the personal abilities of the feoffee were originally prefumed to be the immediate of principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and subfift only for his

⁽x) Co. Litt. 9. (y) *Ibid.* pag. 108. (b) Co. Litt. 42.

⁽z) Wright. 21.

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the unless the feoffor, by express provision in the creation and constitution of the estate, hath given it a longer continute. These express provisions are indeed generally made; in this was for ages the only conveyance, whereby our anthors were wont to create an estate in fee-simple (c), by iting the land to the feoffee, to hold to him and his heirs in ever: though it serves equally well to convey any other that of freehold (d).

But by the mere words of the deed the feoffment is by no cans perfected. There remains a very material ceremony to eperformed, called livery of seisin; without which the feofehas but a mere estate at will (e). This livery of seisin is nother than the pure feodal investiture, or delivery of cornal possession of the land or tenement; which was held abbitly necessary to complete the donation. "Nam feudum ninvestitura nullo modo constituti potuit (f):" and an estate as then only perfect, when, as Fleta expresses it in our law, st juris et seisinae conjunctio (g).

Investitures, in their original rife, were probably inded to demonstrate in conquered countries the actual possion of the lord; and that he did not grant a bare litigious at, which the soldier was ill qualified to prosecute, but a ateable and firm possession. And, at a time when writing as seldom practised, a mere oral gift, at a distance from the at that was given, was not likely to be either long or accutely retained in the memory of by-standers, who were very the interested in the grant. Afterwards they were retained a public and notorious act, that the country might take the of and testify the transfer of the estate; and that such, claimed title by other means, might know against whom bring their actions.

Is all well-governed nations, some notoriety of this kind has a ever held requisite, in order to acquire and ascertain the O 4 property

⁽b) See Appendix. No. I. (d) Co. Litt. 9. (e) Litt. (f) Wright. 37. (g) l. 3 c. 15. § 5.

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property of lands. In the Roman law plenum dominium was no faid to fubfift, unless where a man had both the right, an the corporal possession; which possession could not be acquire without both an actual intention to possess, and an actual feisin, or entry into the premises, or part of them in the nam of the whole (h). And even in ecclefiastical promotion where the freehold paffes to the person promoted, corpor possession is required at this day, to vest the property com pletely in the new proprietor; who, according to the stinction of the canonists (i), acquires the jus ad rem, or in choate and imperfect right, by nomination and institution but not the jusin re, or complete and full right, unless by co poral possession. Therefore in dignities possession is given b installment; in rectories and vicarages by induction, with out which no temporal rights can accrue to the minister, though every ecclesiastical power is vested in him by institution. also even in descents of lands, by our law, which are cast the heir by the act of law itself, the heir has not plenum d minium, or full and complete ownership, till he has made actual corporal entry into the lands: for if he dies befor entry made, his heir shall not be entitled to take the possession but the heir of the person who was last actually seised (k It is not therefore only a mere right to enter, but the actu entry, that makes a man complete owner; fo as to transn the inheritance to his own heirs : non jus, sed seisina, facits pitem (1).

YET, the corporal tradition of lands being sometimes in convenient, a symbolical delivery of possession was in man cases antiently allowed, by transferring something near hand, in the presence of credible witnesses, which by agreeme should serve to represent the very thing designed to be conveyed

⁽h) Nam apiscimur possessionem corpore et animo: neque per corpore; neque per se animo. Non autem ita accipiendum est, ut q fundum possidere welt, omnes glebas circumambulet; sed suffiquamlibet partem ejus fundi introire. (Ff. 41. 2. 3.) And agai traditionibus dominia rerum, non nudis pactis, transferuntur. (Ca. 3. 20. (i) Decretal. l. 3. t. 4. c. 40. (k) See pag. 20. 227, 228. (l) Fleta. l. 6. c. 2 §. 2.

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and an occupancy of this fign or fymbol was permitted as quivalent to occupancy of the land itself. Among the Jews we find the evidence of a purchase thus defined in the book f Ruth (m): " now this was the manner in former time "in Ifrael, concerning redeeming and concerning changing, "for to confirm all things: a man plucked off his shoe, and "gave it to his neighbour; and this was a testimony in If-"rael." Among the antient Goths and Swedes, contracts for the fale of lands were made in the presence of witnesses, tho extended the cloak of the buyer, while the feller cast a dod of the land into it, in order to give possession: and a of or wand was also delivered from the vendor to the vente, which passed through the hands of the witnesses (n). With our Saxon ancestors the delivery of a turf was a necesry solemnity, to establish the conveyance of lands (o). and, to this day, the conveyance of our copyhold estates is mally made from the feller to the lord or his steward by deliey of a rod or verge, and then from the lord to the purchasor y re-delivery of the same, in the presence of a jury of enants.

CONVEYANCES in Writing were the last and most refined provement. The mere delivery of possession, either actual tlymbolical, depending on the ocular testimony and rememrance of the witnesses, was liable to be forgotten or misrerefented, and became frequently incapable of proof. Beles, the new occasions and necessities, introduced by the trancement of commerce, required means to be devised of arging and incumbering estates, and making them liable amultitude of conditions and minute designations for the moses of raising money, without an absolute sale of the and; and fometimes the like proceedings were found useful order to make a decent and competent provision for the nutrous branches of a family, and for other domestic views. one of which could be effected by a mere, simple, corporatransfer of the foil from one man to another, which was incipally calculated for conveying an absolute unlimited

⁽m) ch. 4. v. 7. (n) Stiernhock, de jure Sucon, l. 2. c. 4. Hickes, Dissert, epistolar, 85

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dominion. Written deeds were therefore introduced, i order to specify and perpetuate the peculiar purposes of th party who conveyed: yet still, for a very long series of years, they were never made use of, but in company with the more antient and notorious method of transfer, by deliver of corporal possession.

LIVERY of feifin, by the common law, is necessary to b made upon every grant of an estate of freehold in heredita ments corporeal, whether of inheritance or for life only. I hereditaments incorporeal it is impossible to be made; for they are not the object of the fenses: and in leases for years or other chattel interests, it is not necessary. In leases so years indeed an actual entry is necessary, to vest the estate i the leffee: for the bare leafe gives him only a right to enter which is called his interest in the term, or interesse termini and, when he enters in pursuance of that right, he is the and not before in possession of his term, and complete tenan for years (p). This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the granto could have done; which it would have been improper t have given in this case, because that solemnity is appropriate to the conveyance of a freehold. And this is one reason wh freeholds cannot be made to commence in futuro, becau they cannot (at the common law) be made but by livery feisin; which livery, being an actual mutual tradition of the land, must take effect in praesenti, or not at all (q). 一日 中中 中央

On the creation of a freehold remainder, at one and the fame time with a particular estate for years, we have before feen that at the common law livery must be made to the par ticular tenant (r). But if fuch a remainder be created after wards, expectant on a lease for years now in being, the liver must not be made to the lessee for years, for then it operate nothing: " nam quod semel meum est, amplius meum esse n " patest (s):" but it must be made to the remainder-ma himfell

⁽r) pag. 16 (q) See 1 ag. 165. (p) Co. Litt. 45. (s) Co. Litt.

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melf, by consent of the lessee for years: for without his ment no livery of the possession can be given (t); partly mause such forcible livery would be an ejectment of the teat from his term, and partly for the reasons before given of for introducing the doctrine of attornments.

LIVERY of feifin is either in deed, or in waw. Livery in dis thus performed. The feoffer, lessor, or his attorney, gether with the feoffee, leffee, or his attorney, (for this may seffectually be done by deputy or attorney, as by the princisthemselves in person) come to the land, or to the house; althere, in the presence of witnesses, declare the contents the feoffment or lease, on which livery is to be made. ad then the feoffor, if it be of land, doth deliver to the fefee, all other persons being out of the ground, a clod or f, or a twig or bough there growing, with words to this fet, "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But, if it of a house, the feoffor must take the ring, or latch of the or, the house being quite empty, and deliver it to the feofin the fame form; and then the feoffee must enter alone, dhut to the door, and then open it, and let in the others). If the conveyance or feoffment be of divers lands, lygleattered in one and the same county, then in the feoffor's fession, livery of seisin of any parcel, in the name of the t, sufficeth for all (x): but, if they be in several counties, ere must be as many liveries as there are counties. For, if title to these lands comes to be disputed, there must be as anytrials as there are counties, and the jury of one county t no judges of the notoriety of a fact in another. Besides, thently this feifin was obliged to be delivered corum paribus vicineto, before the peers or freeholders of the neighbourod, who attested such delivery in the body or on the back the deed; according to the rule of the feodal law (y), pares bent interesse investiturae feudi, et non alii: for which this

⁽t) Co. Litt. 48. (u) pag. 288. (w) Cc. Litt: 48. West. lab. 25t. (x) Litt. S. 414. (y) Fend. 1.12. t. 158.

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this reason is expressly given; because the peers or vasals the lord, being bound by their oath of fealty, will take car that no fraud be committed to his prejudice, which stranger might be apt to connive at. And though afterwards, the ocu lar attestation of the pares was held unnecessary, and liver might be made before any credible witnesses, yet the tria in case it was disputed, (like that of all other attestations (z) was still referved to the pares or jury of the county (a) Also, if the lands be out on lease, though all lie in the sam county, there must be as many liver es as there are tenants because no livery can be made in this case, but by the con fent of the particular tenant; and the confent of one will no bind the rest (b). And in all these cases it is prudent, an usual, to indorse the livery of seisin on the back of the deed specifying the manner, place and time of making it; toge ther with the names of the witnesses (c). And thus muc for livery in deed.

LIVERY in law is where the same is not made on the land but in sight of it only; the seossor saying to the seossor if it is a good livery, but not otherwise; unless he dares not enter, throug fear of his life or bodily harm: and then his continual claim made yearly, in due form of law, as near as possible to the lands (d), will suffice without any entry (e). This liver in law cannot however be given or received by attorney, but only by the parties themselves (f).

2. The conveyance by gift, donatio, is properly applied to the creation of an estate-tail, as seoffment is to that of a estate in see, and lease to that of an estate for life or years. It differs in nothing from a seoffment, but in the nature of the estate passing by it: for the operative words of conveyance in this case are do or dedic(g); and gifts in tail are equal imperse

⁽a) See pag. 307. (c) See appendix. No. I. 48. (f) Ibid. 52.

⁽a) Gilb. Ten. 35. (d) Litt. §. 421, &c.

⁽g) West's Symbol. 256.

⁽b) Dyer. 1

⁽e) Co. Litt

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imperfect without livery of seisin, as feoffments in fee-simple (h). And this is the only distinction that Littleton seems
take, and he says (i), "it is to be understood that there is
session and feoffee, donor and donee, lessor and lesse;"
session septiment in fee-simple, donor to
sight in tail, and lessor to a lease for life, or for years, or at
sill. In common acceptation gifts are frequently confounded
with the next species of deeds: which are,

3. GRANTS, concessiones; the regular method by the mmon law of transferring the property of incorporeal herediments, or, fuch things whereof no livery can be had (k). or which reason all corporeal hereditaments, as lands and miles, are faid to lie in livery; and the others, as advowis, commons, rents, reversions, &c. to lie in grant (1). Indthe reason is given by Bracton (m): " traditio, or livery, nibil aliud est quam rei corporalis de persona in personum, de manu in manum, translatio aut in possessionem inductio; sed res in corporales, quae sunt ipsum jus rei vel corpori inbaerens, traditionem non patiuntur." These therefore pass stely by the delivery of the deed. And in figniories, or remons of lands, fuch grants, together with the attornment the tenant (while attornments were requifite) were held to of equal notoriety with, and therefore equivalent to, a ofment and livery of lands in immediate possession. It refore differs but little from a feoffment, except in its subtmatter: for the operative words therein commonly used edediet concessi, have given and granted."

4. A LEASE is properly a conveyance of any lands or tenemis, (usually in consideration of rent or other annual rempense) made for life, for years, or at will, but always for
strime than the lessor hath in the premises: for if it be for
whole interest, it is more properly an assignment than a
str. The usual words of operation in it are, "demise, grant,
"and

h) Litt. § 59. (i) §. 57. (k) Co. Litt. 9. (1) Ibid. (m) 1. 2. c. 18.

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p) Co a lea fi trante

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"and to farm let; dimifi, concessi, et ad firmam tradidine Farm, or feorme, is an old Saxon word fignifying provisions (n): and it came to be used instead of rent or render, because antiently the greater part of rents were reserved in provisions, in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, firmarius was one who held his lands upon payment of a rent or feormethough at present, by a gradual departure from the original sense, the word farm is brought to signify the very estate of lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments: though livery of seisini indeed incident and necessary to one species of leases, viz leases for life of corporeal hereditaments; but to no other.

WHATEVER restrictions, by the severity of the feodallaw might in times of very high antiquity be observed with regar ! to leases; yet by the common law, as it has stood for man centuries, all persons seised of any estate might let leases endure fo long as their own interest lasted, but no longe Therefore tenant in fee-simple might let leases of any dura tion; for he hath the whole interest: but tenant in tail, tenant for life, could make no leases which should bind the issue in tail or reversioner; nor could a husband, seised ju uxoris, make a firm or valid lease for any longer term that the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple w in abeyance, might (with the concurrence of fuch as havet guardianship of the fee) make leases of equal duration wi those granted by tenants in fee-simple: such as parsons a vicars with confent of the patron and ordinary (o). Soa bishops, and deans, and such other sole ecclesiastical corp rations as are feifed of the fee-fimple of lands in their corp rate right, might, with the concurrence and confirmation fuch persons as the law requires, have made leases for year or for life, estates in tail, or in fee, without any limitati

⁽n) Spelm. Gl. 225

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yea tati det estates they pleased, without the confirmation of any der person whatsoever. Whereas now, by several statutes, is power where it was unreasonable, and might be made all use of, is restrained; and, where in the other cases the staint by the common law seemed too hard, it is in some ressure removed. The former statutes are called the restrainty, the latter the enabling statute. We will take a view of tem all, in order of time.

AND, first, the enabling statute, 32 Hen. VIII. c. 28. emwers three manner of persons to make leases, to endure for re lives or one and twenty years, which could not do fo fore. As, first, tenant in tail may by such leases bind his he in tail, but not those in remainder or reversion. adly, a husband seised in right of his wife, in fee-simple fee-tail, provided the wife joins in such lease, may bind and her heirs thereby. Lastly, all persons seised of an ate of fee-fimple in right of their churches, except parsons dvicars, may (without the concurrence of any other person) dtheir fuccessors. But then there must many requisites be lerved, which the statute specifies, otherwise such leases are thinding (p). 1. The lease must be by indenture; and thy deed poll, or by parol. 2. It must begin from the king, or day of the making, and not at any greater difme of time. 3. If there be any old lease in being, it must fift absolutely surrendered, or be within a year of exing. 4. It must be either for twenty one years, or three s; and not for both. 5. It must not exceed the term of telives, or twenty one years, but may be for a shorter n. 6. It must be of corporeal hereditaments, and not fuch things as lie merely in grant; for no rent can be reted thereout by the common law, as the leffor cannot refort them to distrein (q). 7. It must be of lands and tenements

p) Co. Litt. 44. (q) But now by the statute 5 Geo. III. c. alease of tithes or other incorporeal hereditaments, alone, may panted by any bishop or ecclesiastical or electrosynary corporatand the successor shall be intitled to recover the rent by an anos debt, which (in case of a freehold lease) he could not have some and the common law.

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most commonly letten for twenty years past; so that if the have been let for above half the time (or eleven years out the twenty) either for life, for years, at will, or by con of court roll, it is sufficient. 8. The most usual and cu tomary feorm or rent, for twenty years past, must be r ferved yearly on fuch leafe. 9. Such leafes must not made without impeachment of waste. These are the guard imposed by the statute (which was avowedly mad: for the curity of farmers, and the consequent improvement of tillag to prevent unreasonable abuses, in prejudice of the issue, t wife, or the fuccesior, of the reasonable indulgence here given

NEXT follows, in order of time, the dijabling or reftrai ing statute, I Eliz. c. 19. (made entirely for the benefit of t fucceffor) which enacts, that all grants by archbishops as bishops (which include even those confirmed by the dean a chapter; the which, however long or unreasonable, were go at common law) other than for the term of one and twen years or three lives from the making, or without refervingt usual rent, shall be void. Concurrent leases, if confirmed the dean and chapter, are held to be within the exception this statute, and therefore valid; provided they do not exce (together with the lease in being) the term permitted by act (r). But, by a faving expressly made, this statute I Eliz. did not extend to grants made by any bishop to t crown; by which means queen Elizabeth procured many f possessions to be made over to her by the prelates, either her own use, or with intent to be granted out again to favourites, whom she thus gratified without any expense herself. To prevent which (s) for the future, the state 1 Jac. I. c. 3. extends the prohibition to grants and lea made to theking, as well as to any of his subjects.

NEXt comes the statute 13 Eliz. c. 10. explained and forced by the statu e; 14 Eliz. c. 11 & 14. 18 Eliz. c. 11.3 43 Eliz. c. 29. which extend the restrictions, laid by the mention air t

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nationed statute on bishops, to certain other inferior corpotions, both fole and aggregate. From laying all which tother we may collect, that all colleges, cathedrals, and other meliaftical, or eleemofynary corporations, and all parsons and tars, are restrained from making any leases of their lands, nless under the following regulations: 1. They must not med twenty one years, or three lives, from the making. The accustomed rent, or more, must be yearly reserved meon. 3. Houses in corporations, or market towns, may be for forty years; provided they be not the mansion-houses the leffors, nor have above ten acres of ground belonging them; and provided the leffee be bound to keep them in pair: and they may also be aliened in fee-simple for lands equal value in recompense. 4. Where there is an old lease being, no concurrent lease shall be made, unless where the lone will expire within three years. 5. No leafe (by the uity of the statute) shall be made without impeachment of ale(t). 6. All bonds and covenants tending to frustrate eprovisions of the statutes 13 & 18 Eliz. shall be void.

Concerning these restrictive statutes there are two obmations to be made. First, that they do not, by any conmiction, enable any persons to make such leases as they
mely common law disabled to make. Therefore a parson,
vicar, though he is restrained from making longer leases
infortwenty one years or three lives, even with the contof patron and ordinary, yet is not enabled to make any
statall, so as to bind his successor, without obtaining such
ment (u). Secondly, that though leases contrary to these
sare declared void, yet they are good against the lessor
mig his life, if he be a sole corporation: and are also
dagainst an aggregate corporation so long as the head of
wes, who is presumed to be the most concerned in inteto For the act was intended for the benefit of the success
only; and no man shall make an advantage of his own
mg (w).

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⁽t) Co. Litt. 45. (u) Ibid. 44. (w) Ibid. 45.

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THERE is yet another restriction with regard to college AM leafes, by statute 18 Eliz. c. 6. which directs, that one thing smid of the old rent, then paid, should for the future be referred in wheat or malt, referving a quarter of wheat for each 6, and 8d. or a quarter of malt for every 5s; or that the leffees should mile pay for the fame according to the price that wheat and male with thould be fold for, in the market next adjoining to the respectives tive colleges, on the market-day before the rent becomes due, affor This is faid (x) to have been an invention of lord treasurer Burleigh, and Sir Thomas Smith, then principal fecretary of most state; who, observing how greatly the value of money had funk, and the price of all provisions rifen, by the quantity of the bullion imported from the new-found Indies, (which effects by were likely to increase to a greater degree) devised this method for upholding the revenues of colleges. Their forefight and penetration has in this respect been very apparent: for though the rent so reserved in corn was at first but one thin of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted; and the money arising from corn rents is, communibus annis, almost double to the rents referved in money.

THE leases of beneficed clergymen are farther restrained, in case of their non-residence, by statutes 13 Eliz. c. 20. 14 Eliz. c. 11. and 18 Eliz. c. 11. which direct, that, if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish; but that all leafes made by him, of the profits of fuch benefice, and all covenants and agreements of like nature, shall cease and be void; except in the case of licenced pluralists, who are allowed to demife the living, on which they are non-refident, to their curates only; provided fuch curates do not absent themselves above forty days in any one year. And thus much for leafes, with their feveral enlargements and reftrictions (y). 5. AN

⁽x) Strype's annals of Eliz. (y) For the other learning relating to leafes, which is very curious and diffusive, I must refer the studento 3 Bac.

An exchange is a mutual grant of equal interests, the one mideration of the other. The word " exchange" is fo inrequisite and appropriated by law to this case, that and be supplied by any other word, or expressed by any mould mocution (z). The estates exchanged must be equal in male sity (a); not of value, for that is immaterial, but of in-iper-figs fee-simple for fee-simple, a lease for twenty years for due. And the exchange may things that lie either in grant or in livery (b). But no ryof moffeifin, even in exchanges of freehold, is necessary to had the conveyance (c): for each party stands in the place y of bother and occupies his right, and each of them hath feels say had corporal possession of his own land. But entry be made on both fides; for, if either party die before ight the exchange is void, for want of sufficient notoriety(d). for loalfo, if two parsons, by consent of patron and ordihim sexchange their preferments; and the one is presented, uted, and inducted, and the other is presented, and instibut dies before induction; the former shall not keep the sew benefice, because the exchange was not completed, herefore he shall return back to his own (e). For if, after schange of lands or other hereditaments, either party be d of those which were taken by him in exchange, thro' nof the other's title; he shall return back to the possesof his own, by virtue of the implied warranty contained lexchanges (f).

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APARTITION, is when two or more joint-tenants, comers, or tenants in common, agree to divide the lands fo among them in severalty, each taking a distinct part. has in some instances there is a unity of interest, and in all a unity

Labridg. 295. (title, leases and terms for years) where the distreated in a perspicuous and masterly manner: being supto be extracted from a manuscript of sir Geoffrey Gilbert. Litt. 50, 51. (a) Litt. §. 64, 65. (b) Co. Litt. 51. Litt. J. 62. (d) Co. Litt. 50. (e) Perk. § 288. Pag. 301.

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a unity of possession, it is necessary that they all mutually vey and affure to each other the feveral estates, which the to take and enjoy separately. By the common law coparce being compellable to make partition, might have made parol only; but joint-tenants and tenants in common have done it by deed: and in both cases the conveyance have been perfected by livery of feifin (g). And the statut 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. made no al tion in this point. But the statute of frauds, 29 Car. II. hath now abolished this distinction, and made a deed in seady cases necessary.

THESE are the several species of primary, or originale veyances. Those which remain are of the secondary, or de his vative fort; which presuppose some other conveyance cedent, and only serve to enlarge, confirm, alter, restrain, and one ftore, or transfer the interest granted by fuch original one, t veyance. As,

7. RELEASES; which are a discharge or conveyances man's right in lands or tenements, to another that hath for former estate in possession. The words generally used there from are " remised, released, and for ever quit-claimed (h)." A mof these releases may enure either, 1. By way of enlarging eflate, or enlarger l'eflate : as, if there be tenant for life Acc years, remainder to another in fee, and he in remainder relevant Sir all his right to the particular tenant and his heirs, this gir hate o him the estate in fee (i). But in this case the relessee must and ur in possession of some estate for the release to work upon; adthe if there be lessee for years, and, before he enters and is in panish fession, the lessor releases to him all his right in the reverbithbre fuch release is void for want of possession in the relesse (inty ye 2. By way of passing an estate, or mitter l'estate : as when sisvoi of two coparceners releaseth all her right to the other, thate of passeth the fee-simple of the whole (1). And in both the tisno cases there must be a privity of estate between the relessor a relessee (m); that is, one of their estates must be so related

⁽g) Litt. § 230. Co Litt. 169. (h) Litt. 9. 445. (1) Co. Litt. 27 (k) Ibid. § 459. (m) Ibid. 272, 273.

other, as to make but one and the fame estate in law. way of passing a right, or mitter le droit : as if a man be fed, and releaseth to his diffeifor all his right; hereby the for acquires a new right, which changes the quality of tate, and renders that lawful which before was tortious (n). way of extinguishment: as if my tenant for life makes a nAfor life, remainder to B and his heirs, and I release to isextinguishes my right to the reversion, and shall enure advantage of B's remainder as well as of A's particular (0). 5. By way of entry and enfeoffment: as if there be juit disselfers, and the disselfer releases to one of them, he be fole feifed, and shall keep out his former companion; d his the same in effect as if the disseisee had entered, and by put an end to the disseisin, and afterwards had enin, id one of the diffeifors in fee (p). And hereupon we may Te, that when a man has in himself the possession of he must at the common law convey the freehold by femt and livery; which makes a notoriety in the country: faman has only a right or a future interest, he may conhat right or interest by a mere release to him that is in there finn of the land: for the occupancy of the releffee is a A rof sufficient notoriety already.

A CONFIRMATION is of a nature nearly allied to a res gi tate or right in effe, whereby a voidable estate is made and and unavoidable, or whereby a particular estate is increasin plantified, approved, and confirmed (r)." An instance of remain branch of the definition is, if tenant for life leaseth Ge Chity years, and dieth during that term; here the lease for den is voidable by him in reversion: yet, if he hath confirmed date of the lessee for years, before the death of tenant for h the itis no longer voidable but fure (s). The latter branch, or that

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Litt. § 466. (o) Ibid. §. 470.

⁽p) Co. Litt. 278. (s) Ibid. §. 516.

Ilat. 292. (r) Litt. §. 515. 531.

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that which tends to the increase of a particular estate, same in all respects with that species of release, which rates by way of enlargement.

9. A SURRENDER, fur sumredditio, or furrendering un a nature directly opposite to a release; for, as that open the greater estate's descending upon the less, a surrende falling of a less estate into a greater by deed. It is defin a yielding up of an estate for life or years to him that immediate reversion or remainder, wherein the particula may merge or drown, by mutual agreement between It is done by these words, " hath furrendered, grante " yielded up." The furrenderor must be in possession and the furrenderee must have a higher estate, in wh estate surrendered may merge: therefore tenant for life furrender to him in remainder for years (w). In a fur there is no occasion for livery of seisin (x); for there is vity of estate between the surrenderor and the surren the one's particular estate, and the other's remainder, and the same estate; and livery having been once made creation of it, there is no necessity for having it after And, for the same reason, no livery is required on are confirmation in fee to tenant for years or at will, the freehold thereby passes; since the reversion of the rele confirmor, and the particular estate of the relessee, or con are one and the same estate; and where there is already fession, derived from such a privity of estate, any fart livery of possession would be vain and nugatory (y).

another, of the right one has in any estate; but it is usual plied to an estate for life or years. And it differs from only in this: that by a lease one grants an interest less the own, reserving to himself a reversion; in assignments he

⁽t) Co. Litt. 337. (x) Co. Litt. 50.

⁽u) Ibid. 338.

⁽w) Perk.

⁽y) Litt. §. 460.

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the whole property, and the affignee stands to all intents purposes in the place of the affignor.

II. A DEFEAZANCE is a collateral deed, made at the fame ne with a feoffment or other conveyance, containing certain aditions, upon the performance of which the estate then ated may be defeated (z) or totally undone. And in this uner mortgages were in former times usually made; the otgagor enfeoffing the mortgagee, and he at the same time auting a deed of defeazance, whereby the feoffment was adered void on repayment of the money borrowed at a cerinday. And this, when executed at the same time with the iginal feoffment, was considered as part of it by the antient m(a); and, therefore only, indulged: no fubsequent secret rocation of a solemn conveyance, executed by livery of in, being allowed in those days of simplicity and truth; mgh, when uses were afterwards introduced, a revocation suchuses was permitted by the courts of equity. But things twere merely executory, or to be completed by matter bequent, (as rents, of which no feifin could be had till the mof payment; and so also annuities, conditions, warrrans, and the like) were always liable to be recalled by defeames made fubsequent to the time of their creation (b).

II. THERE yet remain to be spoken of some few convey-. xes, which have their force and operation by virtue of the tute of uses.

USES and trufts are in their original of a nature very similar nther exactly the same: answering more to the sidei-comfun than the usus-fructus of the civil law; which latter the temporary right of using a thing, without having the mate property, or full dominion of the substance (c). But t fidei-commissium, which usually was created by will, was adisposal of an inheritance to one, in confidence that he should

[1] From the French verb defaire, infectum reddere. ALitt. 235. (b) Ibid. 237. (c) Ff. 7. 1. 1.

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fhould convey it or dispose of the profits at the will of anot And it was the business of a particular magistrate, the pra fidei-commissarius, instituted by Augustus, to enforce the fervance of this confidence (d). So that the right ther given was looked upon as a vested right, and entitled to medy from a court of justice; which occasioned that kno division of rights by the Roman law, into jus legitimum legal right, which was remedied by the ordinary course law; jus fiduciarium, a right in trust, for which there w remedy in conscience; and jus precarium, a right in cour for which the remedy was only by intreaty or request (e). our law, a use might be ranked under the rights of the sec kind; being a confidence reposed in another who was ten of the land, or terre-tenant, that he should dispose of the according to the intentions of ceftuy que use, or him to w use it was granted, and suffer him to take the profits (f) if a feoffment was made to A and his heirs, to the use of in trust for) B and his heirs; here at the common law A terre-tenant had the legal property and pessession of the la but B the cestuy que use was in conscience and equity to the profits and disposal of it.

THIS notion was transplanted into England from the law, about the close of the reign of Edward III (g), by m of the foreign ecclefiafticks; who introduced it to evad statutes of mortmain, by obtaining grants of lands, not to religious houses directly, but to the use of the religious ho (h): which the clerical chancellors of those times held to be commissa, and binding in conscience; and therefore affi the jurisdiction, which Augustus had vested in his prato compelling the execution of fuch trufts in the court of c cery. And, as it was most easy to obtain such grants dying persons, a maxim was established, that though law the lands themselves were not devisable, yet testator had enfeoffed another to his own use, an was possessed of the use only, such use was devisable

⁽e) Ff. 43. 26. 1. Bacon on use. (d) Inft. 2. tit. 23. (g) Stat. 50 Edw. III. c. 0 Bro. (f) Plowd. 352. Ric. II. c. 9. (h) See pag. 271.

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But we have feen (i) how this evafion was crushed in minfancy, by statute 15 Ric. II. c. 5. with respect to refigious houses.

YET, the idea being once introduced, however fraudulently, afterwards continued to be often innocently, and sometimes my laudably, applied to a number of civil purposes: partimarly as it removed the restraint of alienations by will, and mitted the owner of lands in his lifetime to make various Afgnations of their profits, as prudence, or justice, or famy convenience, might from time to time require. Till at ligth, during our long wars with France and the fubfequent in commotions between the houses of York and Lancaster. is grew almost universal; through the defire that men had then their lives were continually in hazard) of providing for tirchildren by will, and of fecuring their estates from foritures; when each of the contending parties, as they beme uppermost, alternately attainted each other. Wherefore but the reign of Edward IV. (before whose time, lord Bamremarks (k), there are not fix cases to be found relating othe doctrine of uses) the courts of equity began to reduce em to fomething of a regular fyftem.

ORIGINALLY it was held that the chancery could give no lief, but against the very person himself intrusted for cestury wase, and not against his heir or alience. This was altered the reign of Henry VI. with respect to the heir (1); and afawards the same rule, by a parity of reason, was extended fuch alienees as had purchased either without a valuable mideration, or with an express notice of the use (m). But purchasor for a valuable confideration, without notice, might ald the land discharged of any trust or confidence. And also was held, that neither the king or queen, on account of ir dignity royal (n), nor any corporation aggregate, on kount of its limited capacity (p), could be seised to any use bak 1 (c) loss, and and but

E Kol. Abr. 18. (x) Bacon of u [1] pag. 272. (k) on uses 313. (l) Keilw. 42. Year-mk 22. Edw. IV. 6. (m) Keilw. 46 Bacon of uses. 312. Bro. Abr. tit. Feoffin. al uses. 31. Bacon of uses. 346, 347. Bro. Abr. tit. Feoffin. al uses. 43. Bacon 347. (i) pag. 272.

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but their own; that is, they might hold the lands, but we not compellable to execute the trust. And, if the seosses uses died without heir, or committed a forseiture, or marrineither the lord who entered for his escheat or forseiture, the husband who retained the possession as tenant by the cetes, nor the wife who was assigned her dower, were liable perform the use (p); because they were not parties to trust, but came in by act of law; though doubtless their twas no better than that of the heir.

On the other hand the use itself, or interest of cestur use, was learnedly refined upon with many elaborate distin tions. And, 1. It was held that nothing could be granted t use, whereof the use is inseparable from the possession; annuities, ways, commons and authorities, quae ipso usus fumuntur (q): or whereof the seisin could not be instan given (r). 2. A use could not be raised without a sufficient of For where a man makes a feoffment to anot without any consideration, equity presumes that he mean to the use of himself (s): unless he expressly declares it to to the use of another, and then nothing shall be presun contrary to his own expressions (t). But, if either a good a valuable consideration appears, equity will immediately a use correspondent to such consideration (u). 3. Uses w descendible according to the rules of the common law, in case of inheritance in possession; for in this and m other respects aequitas sequitur legem, and cannot establis different rule of property from that which the law has e blished. 4. Uses might be assigned by secret deeds betw the parties (x), or be devised by last will and testament for, as the legal estate in the soil was not transferred by t transactions, no livery of seisin was necessary; and, as intention of the parties was the leading principle in this fpe

(x) Bacon of uses. 312. (y) Ibid.

⁽p) 1 Rep. 122. (s) See pag. 296. 2 Roll. Abr. 780.

⁽q) 1 Jon. 127. (r) Cro. Eliz. (t) 1 And. 37. (u) Moor. 684.

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property, any instrument declaring that intention was allowed to be binding in equity. But ceftuy que use could not stommon law aliene the legal interest of the lands, without beconcurrence of his feoffee (z): to whom he was accounted wlaw to be only a tenant at sufferance (a). 5. Uses were atliable to any of the feodal burthens; and particularly did otescheat for felony or other defect of blood; for escheats. & are the consequence of tenure, and uses are beld of nobuy; but the land itself was liable to escheat, whenever the hod of the feoffee to uses was extinguished by crime or by feet; and the lord (as was before observed) might hold it Scharged of the use (b). 6. No wife could be endowed, or aband have his curtefy, of a use (c): for no trust was deared for their benefit, at the original grant of the estate. and therefore it became customary, when most estates were utin use, to settle before marriage some joint estate to the con tof the husband and wife for their lives; which was the iginal of modern jointures (d). 7. A use could not be exaded by writ of elegit, or other legal process, for the debts tessuy que use (e). For, being merely a creature of equity, common law, which looked no farther than to the person d shally feifed of the land, could award no process against it.

It is impracticable, upon our present plan, to pursue the fine of uses through all the refinements and niceties, which ingenuity of the times (abounding in fubtile disquisitions) duced from this child of the imagination; when once a deture was permitted from the plain simple rules of property blished by the antient law. These principal outlines will fully fufficient to shew the ground of lord Bacon's comint(f), that this course of proceeding "was turned to deteivemany of their just and reasonable rights. A man, that had cause to fue for land, knew not against whom to bring his action, or who was the owner of it. The wife was " defrauded

¹⁾ Stat. 1 Ric. III. c. 1. (a) Bro. Abr. ibid 23. 1. 190. (c) 4 Rep. 1. 2 And. 75. (d) See pag 137. Bro, Abr. til, executions. 90. (f) Use of the law. 153.

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"defrauded of her thirds; the husband of his curtefy; to lord of his wardship, relief, heriot, and escheat; the companies of his extent for debt; and the poor tenant of his lease. To remedy these inconveniences abundance of statutes we provided, which made the lands liable to be extended by the creditors of cestus que use (g); allowed actions for the freehost to be brought against him, if in the actual pernancy or enjoyment of the profits (h); made him liable to actions of was (i); established his conveyances and leases made without the concurrence of his feosfees (k); and gave the lord the war ship of his heir, with certain other feodal perquisites (l).

THESE provisions all tended to consider cestuy que use ast real owner of the estate; and at length that idea was carri into full effect by the statute 27 Hen. VIII. c. 10. which usually called the statute of uses, or, in conveyances and plea ings, the statute for transferring uses into possession. The h feems to have been derived from what was done at the accelli of king Richard III. who having, when duke of Glocell been frequently made a feoffee to uses, would upon the fumption of the crown (as the law was then understood) ha been entitled to hold the lands discharged of the use. But, obviate so notorious an injustice, an act of parliament w immediately passed (m), which ordained that, where he h been so infeoffed jointly with other persons, the land sho vest in the other feoffees, as if he had never been named; that, where he stood folely infeoffed, the estate itself show vest in cestur que use in like manner as he had the use. And the statute of Henry VIII. after reciting the various incom niences before-mentioned and many others, enacts, th "when any person shall be feifed of lands, to the use, con "dence, or trust, of any other person or body politic, the per

⁽g) Stat. 50 Edw. III. c. 6. 2. Ric. II. fess. 2. c. 3. 19. H VII. c. 15. (h) Stat. 1 Ric. II. c. 9. 4 Hen. IV. c. 7. 11 H VI. c. 3. 1 Hen. VII. c. 1. (i) tat. 11 Hen. VI. c. 5. Stat. 1 Ric. HI. c. 1. (l) Stat. 4 Hen. VII. c. 17. 19 Hen. V c. 15 (m) 1 Ric. III. c. 5.

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or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c. of and in the like estates as they have in the use, trust, or considence; and that the estate of the person so seised to use shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition, as they had before in the use." The statute thus executes the use, as our lawyers term it; at is, it conveys the possession to the use, and transfers the sinto possession: thereby making cestury que use complete where of the lands and tenements, as well at law as in equity.

THE statute having thus, not abolished the conveyance to is, but only annihilated the intervening estate of the feoffee, d turned the interest of cestur que use into a legal instead of requitable ownership; the courts of common law began to ke cognizance of uses, instead of sending the party to seek stellef in chancery. And, confidering them now as merely mode of conveyance, very many of the rules before establishlinequity were adopted with improvements by the judges of e common law. The fame perfons only were held capable fleing feifed to a use, the same considerations were necessary wraifing it, and it could only be raifed of the fame hereditaunts, as formerly. But as the statute, the instant it was aled, converted it into an actual possession of the land, a mat number of the incidents, that formerly attended it in its duciary state, were now at an end. The land could not theat or be forfeited by the act or defect of the feoffee, nor taliened to any purchasor discharged of the use, nor be liable odower or curtefy on account of the seifin of such feoffee; mause the legal estate never rests in him for a moment, but sinstantaneously transferred to cessus que use, as soon as the his declared. And, as the use and the land were now conartible terms, they became liable to dower, curtefy, and theat, in consequence of the seisin of cestuy que use, who has now become the terre-tenant also; and they likewise were lo longer devisable by will.

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THE various necessities of mankind induced also the judge very foon to depart from the rigour and simplicity of the rule of the common law, and to allow a more minute and comple construction upon conveyances to uses than upon other Hence it was adjudged, that the use need not always be ex cuted the instant the conveyance is made: but, if it canno take effect at that time, the operation of the statute may wa till the use shall arise upon some future contingency, to have pen within a reasonable period of time; and in the mean whi the antient use shall remain in the original grantor: as, who lands are conveyed to the use of A and B, after a marria shall be had between them (n), or to the use of A and h heirs till B shall pay him a sum of money, and then to theu of B and his heirs (o). Which doctrine, when devises will were again introduced, and confidered as equivalent point of construction to declarations of uses, was also ado ted in favour of executory devises (p). But herein these, whi are called contingent or fpringing uses, differ from an exec tory devise; in that there must be a person seised to such uses the time when the contingency happens, else they can new be executed by the statute; and therefore, if the estate of feofice to fuch use be destroyed by alienation or otherwise, t fore the contingency arises, the use is destroyed for ever whereas by an executory devise the freehold itself is transfe red to the future devisee. And, in both these cases, a may be limited to take effect after a fee (r); because, thou that was forbidden by the common law in favour of lord's escheat, yet, when the legal estate was not extend beyond one fee-simple, such subsequent uses (after a use fee) were before the statute permitted to be limited in equit and then the statute executed the legal estate in the same ma ner as the use before subsisted. It was also held that a u though executed, may change from one to another by cumstances ex post facto (s); as, if A makes a feofiment the use of his intended wife and her eldest son for their liv

⁽n) 2 Roll. Abr. 791. Cro. Eliz. 439. (a) Bro. Abr. tit. eff m. at ufes. 30. (p) See pag. 173. (q) 1 Rep. 134. (s) Bro. 4 tit. Feoff m. at ufes. 30. (s) Bro. 4 tit. Feoff m. at ufes. 30.

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pon the marriage the wife takes the whole use into severalty; d, upon the birth of a fon, the use is executed jointly in m both (t). This is fometimes called a fecondary, fomemes a shifting, use. And, whenever the use limited by the ed expires, or cannot vest, it returns back to him who raised after fuch expiration or during fuch impossibility, and is gled a refulting use. As, if a man makes a feoffment to the eof his intended wife for life, with remainder to the use of rfirst-born son in tail: here, till he marries, the use results ik to himself; after marriage, it is executed in the wife for h; and, if she dies without issue, the whole results back to min fee (u). It was likewise held, that the uses originally plared may be revoked at any future time, and new uses declared of the land, provided the grantor referved to him-I fuch a power at the creation of the estate; whereas the most that the common law would allow, was a deed of deazance coeval with the grant itself (and therefore esteemed part of it) upon events specifically mentioned (w). And, case of such a revocation, the old uses were held instantly case, and the new ones to become executed in their stead And this was permitted, partly to indulge the convemee, and partly the caprice of mankind; who (as lord Banobserves) have always affected to have the disposition of ir property revocable in their own time, and irrevocable terwards.

By this equitable train of decisions in the courts of law, the wer of the court of chancery over landed property was tally curtailed and diminished. But one or two technical uples, which the judges found it hard to get over, restored with tenfold increase. They held in the first place, that wuse could be limited on a use (z)," and that when a man gains and fells his land for money, which raises a use by plication to the bargainee, the limitation of a farther use to another

Bacon of uses. 351. (u) Ibid. 350. 1 Rep. 120. 148. 327. (x) Co. Litt 237. (y) on uses. 316.

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another person is repugnant and therefore void (a). An therefore, on a feoffment to A and his heirs, to the use of and his heirs, in trust for C and his heirs, they held that the statute executed only the first use, and that the second was mere nullity: not adverting, that the instant the first use we executed in B, he became seised to the use of C, which se cond use the statute might as well be permitted to execute; it did the first; and so the legal estate might be instantaneous transmitted down, through a hundred uses upon uses, till ! nally executed in the last ceftuy que use. Again; as the st tute mentions only fuch persons as were feifed to the use others, this was held not to extend to term of years, or other chattel interests, whereof the termor is not feifed, but on possessed (b); and therefore, if a term of one thousand year be limited to A, to the use (or in trust for) B, the statu does not execute this use, but leaves it as at the common la (c). And laftly, (by more modern resolutions) where land are given to one and his heirs, in trust to receive and pay on the profits to another, this use is not executed by the statut for the land must remain in the trustee to enable him to pe form the truft (d).

OF the two more antient distinctions the courts of equiquickly availed themselves. In the first case it was evidenthat B was never intended by the parties to have any beneficianterest; and, in the second, the cestury que use of the terwas expressly driven into the court of chancery to seek his medy: and therefore that court determined, that though the were not uses, which the statute could execute, yet still the were trusts in equity, which in conscience ought to be per formed (e). To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of trust and thus, by this strict construction of the courts of law, as tute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance (

⁽c) Poph. 76. Dver. 369. (d) 1 Equ. Cal. Abr. 383; 38(e) 1 Hal. P. C. 248. (f) Vaugn, 50. Atk. 591.

HOWEVER, the courts of equity, in the exercise of this nw jurisdiction, have wisely avoided in a great degree those michiefs which made uses intolerable. They now consider a mit-estate (either when expressly declared or resulting by neeffary implication) as equivalent to the legal ownership, gommed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and, yalong feries of uniform determinations, for now near a entury past, with some assistance from the legislature, they breraifed a new fystem of rational jurisprudence, by which mils are made to answer in general all the beneficial ends of tes, without their inconvenience or frauds. The trustee is unfidered as merely the instrument of conveyance, and can in whape affect the estate, unless by alienation for a valuable unfideration to a purchasor without notice (g); which, as of the land, is a thing hat can rarely happen. The trust will descend, may be alimed, is liable to debts, to forfeiture, to leafes and other inumbrances, nay even to the curtefy of the husband, as if it was an estate at law. It has not indeed been subjected to lower, more from a cautious adherence to some hasty preceents (h), than from any well-grounded principle. Mobeen held not liable to escheat to the lord, in consequence fattainder or want of heirs (i): because the trust could ever be intended for his benefit. But let us now return to be statute of uses.

THE only service, as was before observed, to which this butte is now configued, is in giving efficacy to certain new and secret species of conveyances; introduced in order to maker transactions of this fort as private as possible, and to be the trouble of making livery of seisin, the only antient surveyance of corporeal freeholds: the security and notoriety of which public investiture abundantly overpaid the labour of soing to the land, or of sending an attorney in one's stead. But this now has given way to,

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^{(1) 2} Freem. 43. (h) 1 Chanc. Rep. 254. 2 P. Wrs. 640. Had. 494. Burgess and Wheate. Hil. 34 Geo. II. in Canc.

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12. A TWELFTH species of conveyances, called a covena to stand seised to uses: by which a man, seised of lands, or venants in consideration of blood or marriage that he we stand seised of the same to the use of his child, wife, or kin man; for life, in tail, or in see. Here the statute executes once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into coporal possession of the land (k), without ever seeing it, by kind of parliamentary magic. But this conveyance can on operate, when made upon such weighty and interesting considerations as those of blood or marriage.

13. A THIRTEENTH species of conveyance, introduced this statute, is that of a bargain and sale of lands; which a kind of a real contract, whereby the bargainor of some a cuniary confideration bargains and fells, that is, contracts convey, the land to the bargainee; and becomes, by fu bargain a truffee for, or feifed to the use of, the bargaine and then the statute of uses completes the purchase (1): or, it hath been well expressed (m), the bargain first vests the u and then the statute vests the possession. But as it was for feen that conveyances, thus made, would want all those be nefits of notoriety, which the old common law affurance were calculated to give; to prevent therefore clandelly conveyances of freeholds, it was enacted in the same session of parliament by statute 27 Hen. VIII. c. 16. that such b gains and fales fhould not enure to pass a freehold, unless faine be made by indenture, and enrolled within fix months one of the courts of Westminster-hall, or with the custos tulorum of the county. Clandestine bargains and sales chattel interests, or leases for years, were thought not worth garding, as fuch interests were very precarious till about years before (n); which also occasioned them to be overloo in framing the statute of uses: and therefore such barga and fales are not directed to be enrolled. But how impossible

⁽k) Bacon. U.e of the law 151. (1) Ibid. 150. (m) Con Jac. 696. (n) See pag. 142.

into foresee, and provide against, all the consequences of imporations! This omission has given rise to.

14. A FOURTEENTH species of conveyance, viz. by lease mirelease; first invented by serjeant Moore, soon after the trute of uses, and now the most common of any, and theremenot to be shaken; though very great lawyers (as particumy Mr. Noy) have formerly doubted its validity (o). It is s contrived. A lease, or rather bargain and fale, upon me pecuniary confideration, for one year, is made by the mant of the freehold to the leffee or bargainee. Now this, thout any enrollment, makes the bargainor stand seised to sufe of the bargainee, and vests in the bargainee the use of term for a year; and then the statute immediately anmes the possession. He therefore, being thus in possession, is mable of receiving a release of the freehold and reversion; tich, we have feen before (p), must be made to a tenant in Meffion: and accordingly, the next day, a release is granted him (q). This is held to supply the place of livery of in; and fo a conveyance by lease and release is said to mount to a feoffment (r).

15. To these may be added deeds to lead or declare the uses some more direct conveyances, as feoffments, fines, and reveries; of which we shall speak in the next chapter: and,

16. DEEDs of revocation of uses; hinted at in a former set (s), and sounded in a previous power, reserved at the sing of the uses (t), to revoke such as were then declared; to appoint others in their stead, which is incident to the ser of revocation (u). And this may suffice for a specimos conveyances sounded upon the statute of uses; and sinish our observations upon such deeds as serve to transfer property.

BEFORE

⁽¹⁾ See appendix. No. II. pag. xi. (2) See appendix. (3) Pag. (4) See appendix. No. II. pag. xi. (4) Co. Litt. 227.

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BEFORE we conclude, it will not be improper to subject a few remarks upon such deeds as are used not to conver, to charge or incumber, lands, and discharge them again: which nature are, obligations or bonds, recognizances, a descazances upon them both.

1. An obligation, or bond, is a deed (w) whereby obligor obliges himself, his heirs, executors, and admit firators, to pay a certain fum of money to another at a appointed. If this be all, the bond is called a fingle one, a plex obligatio; but there is generally a condition added, if if the obligor does some particular act, the obligation shall void, or else shall remain in full force: as, payment of re performance of covenants in a deed; or repayment of a pr cipal fum of money borrowed of the obligee, with inter which principal fum is usually one half of the penal sum spe fied in the bond. In case this condition is not performed, bond becomes forfeited, or absolute at law, and charges obligor while living; and after his death the obligation scends upon his heir, who (on defect of personal assets) bound to discharge it, provided he has real affets by desc as a recompense. So that it may be called, though not a real, yet a collateral, charge upon the lands. How it affe the personal property of the obligor, will be more property confidered hereafter.

If the condition of a bond be impossible at the time of ming it, or be to do a thing contrary to some rule of law the merely positive, or be uncertain, or insensible, the conditatione is void, and the bond shall stand single and uncondonal: for it is the folly of the obligor to enter into such obligation, from which he can never be released. If it is do a thing that is maken in se, the obligation itself is to for the whole is an unlawful contract, and the obliges take no advantage from such a transaction. And if the contract is the contract of the cont

(w)See appendix No. III. pag. xiii.

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be possible at the time of making it, and afterwards omes impossible by the act of God, the act of law, or the tof the obligee himself, there the penalty of the obligation aved: for no prudence or forefight of the obligor could and against such a contingency (x). On the forfeiture of a nd, or its becoming fingle, the whole penalty was recoverable law: but here the courts of equity interposed, and would permit a man to take more than in confcience he ought; z. his principal, interest, and expenses, in case the forsciture med by non-payment of money borrowed; the damages fained, upon non-performance of covenants; and the like. nd the statute 4 & 5 Ann. c. 16. hath also enacted, in the me spirit of equity, that in case of a bond, conditioned for e payment of money, the payment or tender of the prinpal fum due, with interest, and costs, even though the and be forfeited and a fuit commenced thereon, shall be a l, all fatisfaction and discharge.

1. A recognizance is an obligation of record, which a man s) ters into before some court of record or magistrate duly aumear at the affifes, to keep the peace, to pay a debt, or the t. It is in most respects like another bond: the difference ing chiefly this; that the bond is the creation of a fresh ttor obligation de novo, the recognizance is an acknowment of a former debt upon record; the form whereof is, that A. B. doth acknowlege to owe to our lord the king, to the plaintiff, to C. D. or the like, the fum of ten pounds," tondition to be void on performance of the thing stiputhe in which case the king, the plaintiff, C. D. &c. is led the cognizee, is cui cognoscitur;" as he that enters whe recognizance is called the cognizor, " is qui cognofit." This, being either certified to, or taken by the oftt of some court, is witneffed only by the record of that ut, and not by the party's feal: fo that it is not in strict miety a deed, though the effects of it are greater than a mmon obligation; being allowed a priority in point of pay-

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ment, and binding the lands of the cognizor, from the tim of enrollment on record (z). There are also other recognizances, of a private kind, in nature of a statute staple, be virtue of the statute 23 Hen. VIII. c. 6. which have been a ready explained (a), and shewn to be a charge upon reproperty.

3. A DEFEAZANCE, on a bond, or recognizance, or judg ment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeazance of a estate before-mentioned. It differs only from the commo condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed (b). This like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor.

THESE are the principal species of deeds or matter in pai by which estates may be either conveyed, or at least affected Among which the conveyances to uses are by much the mo frequent of any; though in these there is certainly one pa pable defect, the want of fufficient notoriety: fo that pu chasors or creditors cannot know with any absolute certaint what the estate, and the title to it, in realty are, upon which they are to lay out or to lend their money. In the antie feodal method of conveyance (by giving corporal feifin of t lands) this notoriety was in some measure answered; but the advantages refulting from thence are now totally defeat by the introduction of death-bed devises and secret convey ances: and there has never been yet any fufficient guard pro vided against fraudulent charges and incumbrances; fincet difuse of the old Saxon custom of transacting all conveyance at the county court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery (c); and the failure of the general register established by king Richan the first, for the starrs or mortgages made to Jews, in capitul

⁽²⁾ Stat. 29 Car. II. c. 3. §. 18. (b) Co. Litt. 237. 2 Saund. 47. epistolar. 9.

⁽a) See pag. 160.

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far the establishment of a like general register, for seds and wills, and other acts affecting real property, would medy this inconvenience, deserves to be well considered. Scotland every act and event, regarding the transmission sproperty, is regularly entered on record (d.) And some of mown provincial divisions, particularly the extended county syork, and the populous county of Middlesex, have presided with the legislature (e) to erest such registers in their metal districts. But, however plausible these provisions may mear in theory, it hath been doubted by very competent dges, whether more disputes have not arisen in those counts by the inattention and omissions of parties, than premeted by the use of registers.

(d) Dalrymple on feodal property, 262, &c. (e) Stat. 2 Ann. c 4. 6 Ann. c. 35. 7 Ann. c. 20. 8 Geo. II. c. 6.

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CHAPTER THE TWENTY FIRST

OF ALIENATION BY MATTER OF RECORD.

A SSURANCES by matter of record are such as a not entirely depend on the act or consent of the part themselves: but the sanction of a court of record is called it to substantiate, preserve, and be a perpetual testimony the transfer of property from one man to another; or of establishment, when already transferred. Of this nature as Private acts of parliament. 2. The king's grants. 3. Find 4. Common recoveries.

I. PRIVATE acts of parliament are, especially of l years, become a very common mode of affurance. For may fometimes happen, that, by the ingenuity of some, a the blunders of other practitioners, an estate is most grievou entangled by a multitude of contingent remainders, refult trusts, springing uses, executory devises, and the like art cial contrivances (a confusion unknown to the simple of veyances of the common law) fo that it is out of the power either the courts of law or equity to relieve the owner. it may fometimes happen, that, by the strictness or omission of family settlements, the tenant of the estate is abridged fome reasonable power, (as letting leases, making a joint for a wife, or the like) which power cannot be given by the ordinary judges either in common law or equ Or it may be necessary, in settling an estate, to secur against the claims of infants or other persons under le disabilities; who are not bound by any judgments or dec of the ordinary courts of justice. In these, or other c

the like kind, the transcendent power of parliament is called , to cut the Gordian knot; and by a particular law, enacted withis very purpose, to unfetter an estate; to give its tenant assonable powers; or to affure it to a purchasor, against the mote or latent claims of infants or disabled persons, by seting a proper equivalent in proportion to the interest so barred. his practice was carried to a great length in the year fucceedgthe restoration; by setting aside many conveyances alred to have been made by constraint, or in order to screen effates from being forfeited during the usurpation. And laft it proceeded fo far, that, as the noble historian expressit(a), every man had raifed an equity in his own imagition, that he thought ought to prevail against any descent, ament, or act of law, and to find relief in parliament: hich occasioned the king at the close of the question to reuk (b), that the good old rules of law are the best security; id to wish, that men might not have too much cause to n, that the settlements which they make of their estates libe too easily unsettled when they are dead, by the power parliament.

Acrs of this kind are however at present carried on, in m houses, with great deliberation and caution; particuhy in the house of lords they are usually referred to two ges, to examine and report the facts alleged, and to fetall technical forms. Nothing also is done without the uent, expressly given, of all parties in being and capable consent, that have the remotest interest in the matter; less such consent shall appear to be perversely and without reason withheld And, as was before hinted, an equiant in money or other estate is usually settled upon infants, persons not in esse, or not of capacity to act for themselves, ware to be concluded by this act. And a general faving constantly added, at the close of the bill, of the right and treft of all persons whatsoever: except those whose contis fo given or purchased, and who are therein particuly named.

ALAW.

⁽a) Lord Clar. Contin. 162.

⁽b) Ibid. 163.

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A LAW, thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, the as the folemn act of the legislature. It is not therefore allowed to be a public, but a mere private statute; it is not print or published among the other laws of the session: it hath be relieved against, when obtained upon fraudulent suggestion and no judge or jury is bound to take notice of it, unlet the same be specially set forth and pleaded to them. It mains however enrolled among the public records of then tion, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established.

II. THE king's grants are also matter of public recor For, as St. Germyn fays (c), the king's excellency is so his in the law, that no freehold may be given to the king, n derived from him, but by matter of record. And to thise a variety of offices are erected, communicating in a regul fubordination one with another, through which all the king grants must pass, and be transcribed, and enrolled; that fame may be narrowly inspected by his officers, who will i form him if any thing contained therein is improper, or u lawful to be granted. These grants, whether of lands, i nours, liberties, franchifes, or aught besides, are contain in charters, or letters patent, that is, open letters, literat tentes: fo called because they are not sealed up, but expo to open view, with the great feal pendant at the bottom; are usually directed or addressed by the king to all his subje at large. And therein they differ from certain other lett of the king, sealed also with his great seal, but directed particular persons, and for particular purposes: which the fore, not being proper for public inspection, are clo up and sealed on the outside, and are thereupon called w close, literæ clausæ; and are recorded in the close-rolls, in fame manner as the others are in the patent-rolls.

GRANTS or letters patent must first pass by bill: which prepared by the attorney and solicitor general, in consequent

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awarrant from the crown; and is then figned, that is, fuscribed at the top, with the king's own fign manual, and aled with his privy fignet, which is always in the custody the principal fecretary of state; and then fometimes it imdiately passes under the great seal, in which case the patent abscribed in these words, " per ipsum regem, by the king melf (d)." Otherwise the course is to carry an extract of bill to the keeper of the privy feal, who makes out a writ warrant thereupon to the chancery; so that the fign manual the warrant to the privy feal, and the privy feal is the warn to the great feal: and in this last case the patent is subind, " per breve de privato sigillo, by writ of privy seal " But there are some grants, which only pass through min offices, as the admiralty or treasury, in consequence ifign manual, without the confirmation of either the figthe great, or the privy feal.

THE manner of granting by the king does not more differ m that by a subject, than the construction of his grants, m made. 1. A grant made by the king, at the fuit of the ute, shall be taken most beneficially for the king, and inf the party: whereas the grant of a subject is construed Aftrongly against the grantor. Wherefore it is usual to inin the king's grants, that they are made, not at the fuit the grantee, " but ex speciali gratia, certa scientia, et mero ntu regis;" and then they have a more liberal construction 2. A subject's grant shall be construed to include mathings, besides what are expressed, if necessary for the opein of the grant. Therefore, in a private grant of the its of land for one year, free ingress, egress, and regress, at and carry away those profits, are also inclusively atted (g): and if a feoffment of land was made by a lord his villein, this operated as a manumission (h); for he otherways unable to hold it. But the king's grant shall enure to any other intent, than that which is precifely refled in the grant. As, if he grants land to an alien,

Rep. 18. (e) Ibid. 2 Inft. 555. (f) Finch. L. 100. Rep. 112. (g) Co. Litt. 56. (h) Litt. §. 206.

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it operates nothing; for fuch grant shall not also enure to m him a denizen, that so he may be capable of taking by gr (i). 3. When it appears, from the face of the grant, that king is mistaken, or deceived, either in matter of fact or m ter of law, as in case of false suggestion, misinformation, mifrecital of former grants; or if his own title to the th granted be different from what he supposes; or if the gr be informal; or if he grants an estate contrary to the rule law; in any of these cases the grant is absolutely void For instance; if the king grants lands to one and his h male, this is merely void; for it shall not be an estatebecause there want words of procreation, to ascertain the bo out of which the heirs shall iffue: neither is it a fee-sim as in common grants it would be; because it may reasona be supposed, that the king meant to give no more than an tate-tail(1): the grantee is therefore (if any thing) not more than tenant at will (m). And, to prevent deceits of king, with regard to the value of the estate granted, it is pa cularly provided by the flatute 1 Hen. IV. c. 6. that no g of his shall be good, unless, in the grantee's petition for the express mention be made of the real value of the lands.

III. We are next to confider a very usual species of assura which is also of record; viz. a fine of lands and tenements which it will be necessary to explain, 1. The nature of a 2. Its several kinds; and 3. Its force and effect.

1. A FINE is sometimes said to be a seossement of rea (n): though it might with more accuracy be called, an knowlegement of a seossement on record. By which is be understood, that it has at least the same force and with a seossement, in the conveying and assuring of latthough it is one of those methods of transferring estates freehold by the common law, in which livery of seisin is necessary to be actually given; the supposition and acknowledge.

⁽i) Bro, Abr. tit. Patent. 62, Finch. L. 110. (k) Freem. I (l) Finch. 101, 102. (m) Bro. Abr. tit. Estates. 34, tit Pate 104. Dyer. 270. Dav. 45. (n) Co Litt, 50.

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ment thereof in a court of record, however fictitious, ining an equal notoriety. But, more particularly, a fine may theribed to be an amicable composition or agreement of is, either actual or fictitious, by leave of the king or inflices; whereby the lands in question became, or are newleged to be, the right of one of the parties (o). In aiginal it was founded on an actual fuit, commenced at for recovery of the possession of land or other hereditaas; and the possession thus gained by such composition sound to be so sure and effectual, that fictitious actions s, and continue to be, every day commenced, for the of obtaining the fame fecurity.

AFINE is so called because it puts an end, not only to the thus commenced, but also to all other suits and controis concerning the same matter. Or, as it is expressed in mtient record of parliament (p), 18 Edw. I. " non in rega Angliae providetur, vel est, aliqua securitas major vel lannior, per quam aliquis statum certiorem babere possit, uque ad fratum suum verificandum aliquod solennius testimoium producere, quam finem in curia domini regis levatum: in quidem finis sic vocatur, eo quod finis et consummatio mium placitorum esse debet, et bac de causa providebatur." sindeed are of equal antiquity with the first rudiments he law itself; are spoken of by Glanvil (q) and Bracton othe reigns of Henry II. and Henry III. as things then known and long established; and instances have been an inced of them even before the Norman invasion (s). So the statute 18 Edw. I. called modus levandi fines, did give them original, but only declared and regulated the eer in which they should be levied, or carried on. And is as follows:

THE party, to whom the land is to be conveyed or afcommences an action or fuit at law against the other,

⁽q) 1. 8. c. 1. Co. Litt. 120. (p) 2 Roll. Abr. 13. 5.1. 5. c. 28. (Plowd. 369.

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generally an action of covenant (t), by fuing out a writ praecipe, called a writ of covenant (v): the foundation which is a supposed agreement or covenant, that the one s convey the lands to the other; on the breach of which agr ment the action is brought. On this writ there is due to king, by antient prerogative, a primer fine, or a noble every five marks of land fued for; that is, one tenth of annual value (u). The fuit being thus commenced, t follows,

- 2. THE licentia concordandi, or leave to agree the fuit For, as foon as the action is brought, the defendant, know himself to be in the wrong, is supposed to make overture peace and accommodation to the plaintiff. Who, accept them, but having, upon fuing out the writ, given pledge profecute his fuit, which he endangers if he now defert without licence, he therefore applies to the court for le to make the matter up. This leave is readily granted, for it there is also another fine due to the king by his pre gative; which is an antient revenue of the crown, and is ca the king's filver, or fometimes the post fine, with respect the primer fine before-mentioned. And it is as much as primer fine, and half as much more, or ten shillings for e five marks of land; that is, three twentieths of the support annual value (x).
- 3. NEXT comes the concord, or agreement itself (y), a leave obtained from the court; which is usually an ackn legement from the deforciants (or those who keep the out of possession) that the lands in question are the right of complainant. And from this acknowlegement, or recogni of right, the party levying the fine is called the cognizor,

(t) A fine may also be levied on a writ of mesne, or warra chartae, or de consuetudinibus et servitiis. (Finch. L. 278.)

(x) 5 Rep. 39. 2 Init. 511. Stat. 32 Geo. II. c. 14. (y) pend. No. IV. § 3.

⁽v) See appendix. No. IV. §. 1. (u) 2 Inft. 511. pendix. No. IV. §. 2. In the times of firict feodal jurisdiction vafal had commenced a fuit in the lord's court, he could not a don it without leave; lest the lord should be deprived of his quisites for deciding the cause. (Robertson. Cha. 5. i. 31.

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whom it is levied the cognizee. This acknowlegement the made either openly in the court of common pleas, or fore one of the judges of that court, or else before commission the country, empowered by a special authority called not of dedimus potestatem; which judges and commissioners bound by statute 18 Edw. I. st. 4. to take care that the mizers be of full age, sound memory, and out of prison. there be any feme-covert among the cognizors, she is sately examined whether she does it willingly and freely, by compulsion of her husband.

by these acts all the essential parts of a fine are completed; if the cognizor dies the next moment after the fine is acwleged, provided it be subsequent to the day on which the is made returnable (z), still the fine shall be carried on this remaining parts: of which the next is,

The note of the fine (a): which is only an abstract of writof covenant, and the concord; naming the parties, parcels of land, and the agreement. This must be endof record in the proper office, by direction of the states Hen. IV. c. 14.

The fifth part is the foot of the fine, or conclusion of it: thincludes the whole matter, reciting the parties, day, and place, and before whom it was acknowleged or le[b]. Of this there are indentures made, or engrossed, bechirographer's office, and delivered to the cognizor and like; usually beginning thus, 'haec est finalis concordia, is is the final agreement," and then reciting the whole reding at length. And thus the fine is completely levied mon law.

r feveral statutes still more solemnities are superadded, in to render the fine more universally public, and less liable levied by fraud or covin. And, first, by 27 Edw. I. c. 1. the

Comb. 71. (a) Append. No. IV. S. 4. (b) Ibid. 5. 5.

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the note of the fine shall be openly read in the court of mon pleas, at two feveral days in one week, and during reading all pleas shall cease. By 5 Hen. IV. c. 14. an Eliz. c. 3. all the proceedings on fines either at the tin acknowlegement, or previous, or fubsequent thereto, be enrolled of record in the court of common pleas, Ric. III. c. 7. confirmed and enforced by 4 Hen. VII. c the fine, after engroffment, shall be openly read and procla in court fixteen times; viz. four times in the term in v it is made, and four times in each of the three fucces terms; during which time all pleas shall cease: but the reduced to once in each term by 31 Eliz. c. 2. and these clamations are endorsed on the back of the record (c). also enacted by 23 Eliz. c. 3. that the chirographer of shall every term write out a table of the fines levied in county in that term, and shall affix them in some oper of the court of common pleas all the next term: and also deliver the contents of such table to the sheriff of county, who shall at the next affises fix the same in open place in the court, for the more public notoriety of th

2. FINES, thus levied, are of four kinds. 1. What law French is called a fine "fur cognizance de droit, co "que il ad de fon done;" or, a fine upon acknowlegem the right of the cognizee, as that which he hath of the the cognizor (d). This is the best and surest kind of fin thereby the deforciant, in order to keep his covenant wiplaintiss, of conveying to him the lands in question, and same time to avoid the formality of an actual feosimer livery, acknowleges in court a former feosiment, or possession, to have been made to him by the plaintiss, fine is therefore said to be a feossement of record; the thus acknowleged in court, being equivalent to an livery; so that this assurance is rather a confession of a conveyance, than a conveyance now originally made;

⁽c) Append. No. IV. §. 6. (d) This is that fort, of we example is given in the appendix. No. IV.

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forciant, or cognizor, acknowleges, cognoscit, the right to in the plaintiff, or cognizee, as that which he hath de fon of the proper gift of himself, the cognizor. 2. A fine fur cognizance de droit tantum," or, upon acknowlegement the right merely; not with the circumstance of a preceding ffrom the cognizor. This is commonly used to pass a persionary interest, which is in the cognizor. For of such persions there can be no feoffment, or donation with livery, pposed; as the possession during the particular estate belongs athird person (e). It is worded in this manner; "that the agnizor acknowleges the right to be in the cognizee; and grants for himself and his heirs, that the reversion, after the particular estate determines, shall go to the cognizee (f)." A fine, " fur concessit" is where the cognizor, in order to ake an end of disputes, though he acknowleges no precedent th, yet grants to the cognizee an estate de novo, usually for for years, by way of supposed composition. And this may done referving a rent, or the like: for it operates as a new ant (g). 4. A fine, " fur done, grant, et render," is a uble fine, comprehending the fine fur cognizance de droit wee, &c. and the fine fur concessit; and may be used to rate particular limitations of estate: whereas the fine fur mizance de droit come ceo, &c. conveys nothing but an ablute estate, either of inheritance or at least of freehold (h). this last species of fine, the cognizee, after the right is knowleged to be in him, grants back again, or renders to the mizor, or perhaps to a stranger, some other estate in the mises. But, in general, the first species of fine, " fur wmizance de droit come ceo, &c." is the most used, as it weys a clear and absolute freehold, and gives the cognizee hin in law, without any actual livery; and is therefore led a fine executed, whereas the others are but executory.

We are next to confider the force and effect of a fine.

We principally depend, at this day, on the common law,

the two statutes, 4 Hen. VII. c. 24. and 32 Hen. VIII.

Vol. II.

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c. 36.

⁽f) West. Sym. p. 2. § 95. (g) West. Sym. p. 2. § 95. (g) West. 66. (h) Sala. 340.

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c. 36. The antient common law, with respect to this point is very forcibly declared by the statute 18 Edw. I. in thes words. " And the reason, why such solemnity is required in " the passing of a fine, is this; because the fine is so high " bar, and of so great force, and of a nature so powerful i " itself, that it precludes not only those which are parties an " privies to the fine, and their heirs, but all other persons i "the world, who are of full age, out of prison, of sound me " mory, and within the four feas the day of the fine levied " unless they put in their claim within a year and a day. But this doctrine, of barring the right by non-claim, was about lished for a time by a statute made in 34 Edw. I. c. 16. which admitted persons to claim, and falsify a fine, at any indefini distance (i): whereby, as fir Edward Coke observes (k), gre contention arose, and few men were sure of their possession till the parliament held 4 Hen. VII. reformed that mischie and excellently moderated between the latitude given by t statute and the rigour of the common law. For, the statut then made (1), restored the doctrine of non-claim, but e tended the time of claim. So that now, by that statute, t right of all frangers whatfoever is bound, unless they ma claim, not within one year and a day, as by the common la but within five years after proclamations made : except fem coverts, infants, prisoners, persons beyond the seas, and su as are not of whole mind; who have five years allowed them and their heirs, after the death of their husbands, th attaining full age, recovering their liberty, returning into En land, or being restored to their right mind.

IT feems to have been the intention of that politic prinking Henry VII, to have covertly by this statute extended in to have been a bar of estates-tail, in order to unfetter them easily the estates of his powerful nobility, and lay them mopen to alienations; being well aware that power will alwaccompany property. But doubts having arisen whether to could, by mere implication, be adjudged a sufficient bar, (which is the sum of the sum of

⁽i) Litt. §. 441. (k) 2 Inft. 518. (l) 4 Hen. VII. c. 2.

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playwere expressly declared not to be by the statute de donis) is statute 32 Hen. VIII. c. 36. was thereupon made; which moves all dissipation of sull age, to whom or to whose ancestors lands have mentailed, shall be a perpetual bar to them and their heirs siming by force of such entail: unless the sine be levied a woman after the death of her husband, of lands which me, by the gift of him or his ancestor, assigned to her in after her jointure (m); or unless it be of lands entailed by the soft parliament or letters patent, and whereof the reversion though to the crown.

from this view of the common law, regulated by these mutes, it appears, that a fine is a solemn conveyance on red from the cognizor to the cognizee, and that the persons and by a fine are parties, privies, and strangers.

The parties are either the cognizors, or cognizees; and so are immediately concluded by the fine, and barred of platent right they might have, even though under the legal rediment of coverture. And indeed, as this is almost the lyast that a feme-covert, or married woman, is permitted law to do, (and that because she is privately examined as her voluntary consent, which removes the general suspine of compulsion by her husband) it is therefore the usual dalmost the only safe method, whereby she can join in the safettlement, or incumbrance, of any estate.

PRIVIES to a fine are such as are any way related to the mes who levy the fine, and claim under them by any right blood, or other right of representation. Such as are the ageneral of the cognizor, the iffue in tail since the statute Henry the eighth, the vendee, the devisee, and all others amust make title by the persons who levied the fine. For aft of the ancestor shall bind the heir, and the act of the principal

(m) See flatute 11 Men. VII. c, 20.

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principal his substitute, or such as claim under any conve ance made by him subsequent to the fine so levied (n).

STRANGERS to a fine are all other persons in the wor except only parties and privies. And these are also bound by fine, unless, within five years after proclamations made, the interpose their claim; provided they are under no legal im diments, and have then a present interest in the estate. T impediments, as hath before been faid, are coverture, infan imprisonment, infanity, and absence beyond sea: and person who are thus incapacitated to profecute their rights, have years allowed them to put in their claims after fuch imper ments are removed. Persons also that have not a present, a future interest only, as those in remainder or reversion, he five years allowed them to claim in, from the time that fu right accrues (o). And if within that time they negled claim, or (by the statute 4 Ann. c. 16.) if they do not bri an action to try the right, within one year after making fi claim, and profecute the same with effect, all persons what ever are barred of whatever right they may have, by force the statute of non-claim.

But, in order to make a fine of any avail at all, it is ceffary that the parties should have some interest or estate the lands to be affected by it. Else it were possible that strangers, by a mere confederacy, might without any rist defraud the owners by levying fines of their lands; for if attempt be discovered, they can be no sufferers, but musto remain in statu quo: whereas if a tenant for life or years vies a fine, it is an absolute forfeiture of his estate to the mainderman or reversioner (p), if claimed in proper time is not therefore to be supposed that such tenants will quently run so great a hazard; but if they do, and the claim not duly made within five years after their respective to expire (q), the estate is for ever barred by it. Yet when

⁽n) 3 Rep. 87. (o) Co. Litt. 372. (p) 1bid. 25t. 2 Lev. 52.

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innger, whose presumption cannot thus be punished, officially interferes in an estate which in no wise belongs to him, is fine is of no effect; and may at any time be set aside (unsists by such as are parties or privies thereunto) (r) by pleading the partes sinis nibil babuerunt." And thus much for the inveyance or assurance by sine: which not only, like other inveyances, binds the grantor himself, and his heirs; but so all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted ly law.

IV. THE fourth species of assurance, by matter of record, a common recovery. Concerning the original of which, it is formerly observed (s), that common recoveries were instead by the ecclesiastics to elude the statutes of mortmain; it afterwards encouraged by the finesse of the courts of law 112 Edw. IV. in order to put an end to all settered inherites, and bar not only estates-tail, but also all remainders dieversions expectant thereon. I am now therefore only consider, first, the nature of a common recovery; and, sendly, its sorce and effect.

AND, first, the nature of it; or what a common recoyis. A common recovery is so far like a fine, that it is a
tor action, either actual or sictitious: and in it the lands
succeed against the tenant of the freehold; which recoy, being a supposed adjudication of the right, binds all
sons, and vests a free and absolute see-simple in the recotor. A recovery therefore being in the nature of an action
law, not immediately compromised like a fine, but carried
through every regular stage of proceeding, I am greatly
mehensive that its form and method will not be easily unstood by the student, who is not yet acquainted with the
use of judicial proceedings; which cannot be thoroughly
lained, till treated of at large in the third book of these
mentaries. However I shall endeavour to state its nature
iprogress, as clearly and concisely as I can; avoiding, as

⁽r) Hob. 334.

⁽s) pag. 117. 271.

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far as possible, all technical terms, and phrases not hithe interpreted.

us da vam Bres i Such en LET us, in the first place, suppose David Edwards (t) to tenant of the freehold, and desirous to suffer a common re very, in order to bar all entails, remainders, and reverlig and to convey the same in fee-simple to Francis Golding. effect this, Golding is to bring an action against him for lands; and he accordingly fues out a writ, called a prace quod reddat, because those were its initial or most opera words, when the law proceedings were in Latin. In this the demandant Golding alleges, that the defendant Edwa (here called the tenant) has no legal title to the land; but he came in possession of it after one Hugh Hunt had tur the demandant out of it (v). The subsequent proceedings made up into a record or recovery roll (u), in which the and complaint of the demandant are first recited : wheren the tenant appears, and calls upon one Jacob Morland, is supposed, at the original purchase, to have warranted title to the tenant; and thereupon he prays, that the faid cob Morland may be called in to defend the title which h warranted. This is called the voucher, vocatio, or calling Jacob Morland to warranty; and Morland is called the chee. Upon this, Jacob Morland, the vouchee, appear impleaded, and defends the title. Whereupon Golding, demandant, defires leave of the court to imparl, or confer the vouchee in private; which is (as ufual) allowed him. foon afterwards the demandant, Golding, returns to court, Morland the vouchee disappears or makes default. Where on judgment is given for the demandant, Golding, now ca the recoveror, to recover the lands in question against the nant, Edwards, who is now the recoveree: and Edwards judgment to recover of Jacob Morland lands of equal va in recompense for the lands so warranted by him, and loft by his default; which is agreeable to the doctrine of

⁽t) See Appendix. No. V.

⁽v) §. 1.

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mentioned in the preceding chapter (w). This is called the recompense, or recovery in value. But Jacob Morland having no land of his own, being usually the cryer of the court (who, from being frequently thus vouched, is called the common vouchee) it is plain that Edwards has only a nominal recompense for the lands so recovered against him by Golding; which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery opentes merely in the nature of a conveyance in see-simple, from Edwards the tenant in tail, to Golding the purchasor.

THE recovery, here described, is with a fingle voucher mly; but fometimes it is with double, treble, or farther mucher, as the exigency of the case may require. And indeed it is now usual always to have a recovery with double mucher at least: by first conveying an estate of freehold to my indifferent person, against whom the praecipe is brought; ad then he vouches the tenant in tail, who vouches over the mmon vouchee (x). For, if a recovery be had immedimy against tenant in tail, it bars only such estate in the preiles of which he is then actually seised; whereas if the reovery be had against another person, and the tenant in tail be muched, it bars every latent right and interest which he may wein the lands recovered (y). If Edwards therefore be teat of the freehold in possession, and John Barker be tenant itail in remainder, here Edwards doth first vouch Barker, d then Barker vouches Jacob Morland the common voute; who is always the last person vouched, and always akes default: whereby the demandant Golding recovers the ad against the tenant Edwards, and Edwards recovers a compense of equal value against Barker the first vouchee; to recovers the like against Morland the common vouchee gainst whom such ideal recovery in value is always ultiately awarded.

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⁽w) pag. 301. (x) See appendix. pag. xviii. (y) Bro. Abr. Taile. 32. Plowd. 8.

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THIS supposed recompense in value is the reason why iffue in tail is held to be barred by a common recovery. For if the recoveree should ever obtain a recompense in lands fro the common vouchee (which there is a possibility in content plation of law, though a very improbable one, of his doing these lands would supply the place of those so recovered fro him by collusion, and would descend to the iffue in tail (This reason will also hold, with equal force, as to most mainder-men and reversioners; to whom the possibility w remain and revert, as a full recompense for the reality, whi they were otherwise entitled to: but it will not always hol and therefore, as Pigott fays (a), the judges have been ev affuti, in inventing other reasons to maintain the authority recoveries. And, in particular, it hath been faid, that, thou the estate-tail is gone from the recoveree, yet it is not defin ed, but only transferred; and still subsists, and will ever co tinue to subsist (by construction of law) in the recoveror. heirs and affigns: and, as the effate-tail fo continues to fu fift for ever, the remainders or reversions expectant on determination of fuch estate-tail can never take place.

To such awkward shifts, such subtile refinements, and suffrange reasoning, were our ancestors obliged to have recour in order to get the better of the stubborn statute de da The design, for which these contrivances were set on so was certainly laudable; the unrivetting the setters of estate tail, which were attended with a legion of mischies to commonwealth: but, while we applaud the end, we can but admire the means. Our modern courts of justice hindeed adopted a more manly way of treating the subject; considering common recoveries in no other light, than as formal mode of conveyance, by which tenant in tail is enabto aliene his lands. But, since the ill consequences of settered heritances are now generally seen and allowed, and of course utility and experience of setting them at liberty are apparent

⁽z) Dr. & St. b. 1. dial. 26.

⁽a) of com. recov. 13, 1

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hath often been wished, that the process of this conveyance hortened, and rendered less subject to niceties, by either mally repealing the statute de donis; which perhaps, by rewing the old doctrine of conditional fees, might give birth many litigations: or by vesting in every tenant in tail of full age the same absolute fee-simple at once, which now he may obtain whenever he pleases, by the collusive fiction of a common recovery; though this might possibly bear hard upon those in remainder or reversion, by abridging the chances hey would otherwise frequently have, as no recovery can be fuffered in the intervals between term and term, which fomeimes continue for near five months together: or, lastly, by mpowering the tenant in tail to bar the estate-tail by a solemn heed, to be made in term time and enrolled in some court of mord; which is liable to neither of the other objections, and swarranted not only by the usage of our American colonies, but by the precedent of the statute (b) 21 Jac. I. c. 19. which, in case of a bankrupt tenant in tail, empowers his commisioners to fell the estate at any time, by deed indented and arolled. And if, in so national a concern, the emoluments of the officers, concerned in passing recoveries, are thought be worthy attention, those might be provided for in the les to be paid upon each enrollment.

2. The force and effect of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant intail may, by this method of assurance, convey the lands held in tail to the recoveror his heirs and assigns, absolutely free and distanged of all conditions and limitations in tail, and of all amainders and reversions. But, by statute 34 & 35 Hen. Will. c. 20. no recovery had against tenant in tail, of the ling's gift, whereof the remainder or reversion is in the king, hall bar such estate-tail, or the remainder or reversion of the mown. And by the statute 11 Hen. VII. c. 20. no woman, ther her husband's death, shall suffer a recovery of lands settled on her by her husband, or settled on her husband and

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her by any of his ancestors. And by statute 14 Eliz. c. 8. no tenant for life, of any sort, can suffer a recovery, so as to bind them in remainder or reversion. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid recovery; either he, or the tenant to the praecipe by him made, must veuch the remainderman in tail, otherwise the recovery is void: but if he does vouch such remainderman, and he appears and vouches the common vouchee, it is then good; for if a man be vouched and appears, and suffers the recovery to be had, it is as effectual to bar the estate-tail as if he himself were the recoveree (c).

In all recoveries it is necessary that the recoveree, or tenant to the praecipe, as he is usually called, be actually seised of the freehold, else the recovery is void (d). For all actions, to recover the seisin of lands, must be brought against the ac tual tenant of the freehold, else the suit will lose its effect; fince the freehold cannot be recovered of him who has it not And, though these recoveries are in themselves fabulous and fictitious, yet it is necessary that there be actores fabulae properly qualified. But the nicety thought by fome modern practitioners to be requifite in conveying the legal freehold in order to make a good tenant to the praecipe, is removed by the provisions of the statute 14 Geo. II. c. 20. which enacts with a retrospect and conformity to the antient rule of law(e) that, though the legal freehold be vested in lessees, yet those who are entitled to the next freehold estate in remainder of reversion may make a good tenant to the praecipe: and that though the deed or fine which creates fuch tenant be sup fequent to the judgment of recovery, yet, if it be in the fam term, the recovery shall be valid in law: and that, though the recovery itself do not appear to be entered, or be not re gularly entered, on record, yet the deed to make a tenant to the praecipe, and declare the uses of the recovery, shall after possession

⁽c) Salk. 571. Burr. I. 115.

⁽d) Pigott. 28.

⁽e) Pigott 41, &c.

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possession of twenty years be sufficient evidence, on behalf of a purchasor for valuable consideration, that such recovery was duly suffered. And this may suffice to give the student a general idea of common recoveries, the last species of assurances by matter of record.

BEFORE I conclude this head, I must add a word concerning deeds to lead, or to declare, the uses of fines, and of recoveries. For if they be levied or fuffered without any good consideration, and without any uses declared, they, like other conveyances, enure only to the use of him who levies or infers them (f). And if a confideration appears, yet as the most usual fine, " sur cognizance de droit come ceo, &c. conreys an absolute estate, without any limitations, to the cognizee; and as common recoveries do the fame to the recovefor; these affurances could not be made to answer the purpose of family settlements, (wherein a variety of uses and defignations is very often expedient) unless their force and effelt were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The fine or recovery itself, like a power once gained m mechanics, may be applied and directed to give efficacy to an infinite variety of movements, in the vast and intricate machine of a voluminous family settlement. And, if these deeds are made previous to the fine or recovery, they are alled deeds to lead the uses; if subsequent, deeds to declare them. As, if a tenant in tail, with reversion to himself in he, would settle his estate on B for life, remainder to C in tail, remainder to D in fee; this is what by law he has no power of doing effectually, while his own eftate-tail is in being. He therefore usually covenants to levy the fine (or, if there be my intermediate remainders, to fuffer a recovery) to E, and that the fame shall enure to the uses in such settlement mentimed. This is now a deed to lead the uses of the fine or recovery; and the fine when levied, or recovery when suffered, shall enure when uses so specified and no other. For though E, the conusee wrecoveree, hath a fee-simple vested in himself by the fine or movery; yet, by the operation of this deed, he becomes a

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mere instrument or conduit-pipe, seised only to the use of B, C, and D, in successive order: which use is executed immediately, by force of the statute of uses (g). Or, if a fine or recovery be had without any previous settlement, and a deed be asterwards made between the parties, declaring the uses to which the same shall be applied, this will be equally good, as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For by statute 4 & 5 Ann. c. 16. indentures to declare the uses of sines and recoveries, made after the sines and recoveries had and suffered, shall be good and effectual in law, and the sine and recovery shall enure to such uses, and be esteemed to be only in trust, notwithstanding the statute of frauds 29 Car. II. c. 3. enacts, that all trusts shall be declared in writing at (and not after) the time when such trusts are created.

(g) This doctrine may perhaps be more clearly illustrated by ex ample. In the deed or marriage settlement in the appendix, No II. §. 2. we may suppose the lands to have been originally settled on Abraham and Cecilia Barker for life, remainder to John Barke in tail, with divers other remainders over, reversion to Cecilia Bar ker in fee; and now intended to be fettled to the feveral ufe therein expressed, viz. of Abraham and Cecilia Barker till the man riage; remainder to John Barker for life; remainder to truffee to preferve the contingent remainders; remainder to his widow for life; for her jointure; remainder to other trustees, for a term of five bundred years; remainder to their first and other sons in tail remainder to their daughters in tail; remainder to John Baikeri tail; remainder to Cecilia Barker in fee. Now it is necessary in order to bar the estate-tail of John Barker, and the remainders ex peclant thereon, that a recovery be suffered of the premises: an it is thought proper (for though usual, it is by no means necessary , fee Forrester. 167) that in order to make a good tenant of the free hold, or tenant to the praecipe, during the coverture, a fine should be levied by Abraham, Cecilia, and John Barker; and that the recovery itself be suffered against this tenant to the praecipe, wh shall vouch John Barker, and thereby bar his estate-tail, and become tenant of the ee-simp e by virtue of such recovery: the uses of which effite, so acquired, are to be those expressed in this deed. Ac cordingly the parties covenant to thefe feveral acls: (fee pag. viii. ard in co: fequence the cof the fine and recovery are had and fuffere (No. IV. and No. V.) of which this conveyance is a deed to lea the u'es,

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OF ALIENATION BY SPECIAL CUSTOM.

ITE are next to confider affurances by special custom, ob-W taining only in particular places, and relative only to particular species of real property. This therefore is a very grow title; being confined to copyhold lands, and fuch ultomary estates, as are holden in antient demesne, or in anors of a fimilar nature: which, being of a very peculiar ind, and originally no more than tenancies in pure or priliged villenage, were never alienable by deed; for, as that ight tend to defeat the lord of his figniory, it is therefore forfeiture of a copyhold (a). Nor are they transferrable by after of record, even in the king's courts, but only in the ut baron of the lord. The method of doing this is genely by furrender; though in fome manors, by special custom, coveries may be fuffered of copyholds (b); but these differgin nothing material from recoveries of free land, fave by that they are not suffered in the king's courts, but in court baron of the manor, I shall confine myself to convances by furrender, and their confequences.

Surrender, furfumredditio, is the yielding up of the the by the tenant into the hands of the lord, for such purches as in the surrender are expressed. As, it may be, to the fand behoof of A and his heirs; to the use of his own will; the like. The process, in most manors, is, that the tenant comes

⁽a) Litt. §. 74.

⁽b) Moor. 637.

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comes to the steward, either in court, (or, if the custom pe mits, out of court) or else to two customary tenants of the fame manor; provided that also have a custom to warranti and there by delivering up a rod, a glove, or other fymb as the custom directs, refigns into the hands of the lord, the hands and acceptance of his faid steward, or of the sa two tenants, all his interest and title to the estate; in trust be again granted out by the lord, to fuch persons and for su uses as are named in the furrender, and the custom of the m nor will warrant. If the furrender be made out of cou then, at the next or some subsequent court, the jury or h mage must present and find it upon their oaths; which pr fentment is an information to the lord or his steward of wh has been transacted out of court. Immediately upon su furrender in court, or upon presentment of a furrender ma out of court, the lord by his steward grants the same la again to cestuy que use, (who is sometimes, though rat improperly, called the furrenderee) to hold by the antientre and customary services: and thereupon admits him tenant the copyhold, according to the form and effect of the furn der, which must be exactly pursued. And this is done delivering up to the new tenant the rod, or glove, or the li in the name, and as the fymbol, of corporal feifin of lands and tenements. Upon which admission he pays a to the lord, according to the custom of the manor, and ta the oath of fealty.

In this brief abstract of the manner of transferring co hold estates we may plainly trace the visible sootsteps of feodal institutions. The sief, being of a base nature and nure, is unalienable without the knowlege and consent of lord. For this purpose it is resigned up, or surrendered his hands. Custom, and the indulgence of the law, w favours liberty, has now given the tenant a right to name successor; but formerly it was far otherwise. And I am to suspect that this right is of much the same antiquity the introduction of uses with respect to freehold lands: the alience of a copyhold had merely jus siduciarum,

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hich there was no remedy at law, but only by subpoena chancery (c). When therefore the lord had accepted a mender of his tenant's interest, upon confidence to re-grant restate to another person, either then expressly named or be afterwards named in the tenant's will, the chancery forced this trust as a matter of conscience, which jurisdicthough feeming new in the time of Edward IV (d). s generally acquiesced in, as it opened the way for the mation of copyholds, as well as of freehold estates, and it rendered the use of them both equally devisable by tefment. Yet, even to this day, the new tenant cannot be adted but by composition with the lord, and paying him a thy way of acknowlegement for the licence of alienation. Ito this the plain feodal investiture, by delivering the abol of feifin in presence of the other tenants in open court; mando hasta vel aliud corporeum quid libet porrigitur a donino se investituram facere dicente; quae saltem coram duowasallis solenniter fieri debet (e):" and, to crown the ole, the oath of fealty annexed, the very bond of feodal ection. From all which we may fairly conclude, that, there been no other evidence of the fact in the rest of our wes and estates, the very existence of copyholds, and the mer in which they are transferred, would incontestibly wethe very universal reception, which this northern system roperty for a long time obtained in this island; and which municated itself, or at least its similitude; even to our willeins and bondmen.

Ins method of conveyance is so essential to the nature of syphold estate, that it cannot possibly be transferred by other assurance. No feossement, sine, or recovery (in sing's courts) has any operation thereupon. If I would sange a copyhold estate with another, I cannot do it by ordinary deed of exchange at the common law; but we furrender to each other's use, and the lord will situs accordingly. If I would devise a copyhold, I must surrender

Cro. Jac. 568.

⁽d) Bro. Abr. tit. Tenant percopie, 10.

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furrender it to the use of my last will and testament; and my will I must declare my intentions, and name a devi who will then be entitled to admission (f).

In order the more clearly to apprehend the nature of a peculiar affurance, let us take a separate view of its seven parts; the surrender, the presentment, and admittance.

1. A SURRENDER, by an admittance subsequent when the conveyance is to receive its perfection and confirmati is rather a manifestation of the alienor's intention, that transfer of any interest in possession. For, till admittance cestuy que use, the lord taketh notice of the surrenderoras tenant; and he shall receive the profits of the land to his o use, and shall discharge all services due to the lord. Yet interest remains in him not absolutely, but sub modo; for cannot pass away the land to another, or make it subject any other incumbrance than it was subject to at the time of furrender. But no manner of legal interest is vested in nominee before admittance. If he enters, he is a trespa and punishable in an action of trespass: and if he furrent to the use of another, such surrender is merely void, and no matter ex post facto can be confirmed. For though h admitted in pursuance of the original surrender, and the acquires afterwards a fufficient and plenary interest as a lute owner, yet his fecond furrender previous to his own mittance is absolutely void ab initio; because at the tim fuch surrender he had but a possibility of an interest, could therefore transfer nothing: and no subsequent ad tance can make an act good, which was ab initio void. though upon the original furrender the nominee hath b possibility, it is however such a possibility, as may when he pleases be reduced to a certainty: for he cannot eithe force or fraud be deprived or deluded of the effect and fr of the fur ender; but if the lord refuse to admit him, compellable to do it by bill in chancery or a mandamus and the furrenderor can in no wife defeat his grant; his h

⁽f) Co. Copyh. § 36.

⁽g) 2 Rall. Rep. 107.

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ing for ever bound from disposing of the land in any other my, and his mouth for ever stopped from revoking or counemanding his own deliberate act (h); except in the case of a smender to the use of his will, which is always revocable (j).

1. As to the presentment: that, by the general custom of mors, is to be made at the next court baron immediately after he furrender; but by special custom in some places it will be wd, though made at the fecond or other fubsequent court. and it is to be brought into court by the fame persons that ok the furrender, and then presented by the homage; and in points material must correspond with the true tenor of the mender itself. And therefore, if the surrender be condimal, and the presentment be absolute, both the surrender, mentment, and admittance thereupon are wholly void (i): furrender, as being never truly presented; the presentunt, as being false; and the admittance, as being founded on ich untrue presentment. If a man surrenders out of court, id dies before presentment, and presentment be made after ideath, according to the custom, this is sufficient (k). So m, if cestuy que use dies before presentment, yet, upon preatment made after his death, his heir according to the custom be admitted. The same law is, if those, into whose hands furrender is made, die before presentment; for, upon suftient proof in court that fuch a furrender was made, the in shall be compelled to admit accordingly. And if the ward, the tenants, or others into whose hands such surrender made, do refuse or neglest to bring it in to be presented, upon patition preferred to the lord in his court baron, the party neved shall find remedy. But if the lord will not do him the and justice, he may sue both the lord, and them that ok the furrender, in chancery, and shall there find relief (1).

3. ADMIT-

⁽h) Co. Cop. §. 39. (j) 4 Rep. 23. (i) Co. Copyh. (k) Co. Litt. 62. (l) Co. Copyh. §. 40.

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3. ADMITTANCE is the last stage, or perfection, of co hold assurances. And this is of three forts: first, an admittance upon a voluntary grant from the lord; secondly, admittance upon surrender by the former tenant; and this ly, an admittance upon a descent from the ancestor.

In admittances, even upon a voluntary grant from thele when copyhold lands have escheated or reverted to him, lord is confidered as an inftrument. For, though it is in power to keep the lands in his own hands, or to dispose them at his pleasure, by granting an absolute fee-simple freehold, or a chattel interest therein; and quite to char their nature from copyhold to focage tenure, fo that he n well be reputed their absolute owner and lord; yet, if her still continue to dispose of them as copyhold, he is bound observe the antient custom precisely in every point, and neither in tenure nor estate introduce any kind of alteration for that were to create a new copyhold: wherefore in respect the law accounts him custom's instrument. For copyhold for life falls into the lord's hands, by the tenar death, though the lord may destroy the tenure and enfr chife the land, yet if he grants it out again by copy, he neither add to nor diminish the ancient rent, nor make the minutest variation in other respects (m): nor is the nant's estate, fo granted, subject to any charges or incu brances by the lord (n).

In admittances upon furrender of another, the lord is to intent reputed as owner, but wholly as an instrument: and tenant admitted shall likewise be subject to no charges or cumbrances of the lord; for his claim to the estate is solunder him that made the surrender (0).

⁽m) Co. Cop. § 41. (n) 8 Rep. 63. (o) 4 Rep. Co. Litt. 59.

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AND, as in admittances upon furrenders, so in admittances upon descents by the death of the ancestor, the lord is used as a mere instrument; and, as no manner of interest passes into him by the turrender or the death of his tenant, so no interest passes out of him by the act of admittance. And therefore neither in the one case, nor the other, is any respect had to the quantity or quality of the lord's estate in the manor. For whether the tenant in fee, or for years, whether he be in possession by hight or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, heause they are judicial, or rather ministerial, acts, which sery lord in possession is bound to perform (p).

ADMITTANCES, however, upon furrender differ from adnittances upon descent in this: that by furrender nothing is nsted in cestuy que use before admittance, no more than in vountary admittances; but upon descent the heir is tenant by mpy immediately upon the death of his ancestor: not indeed ball intents and purposes, for he cannot be sworn on the omage nor maintain an action in the lord's court as tenant; utto most intents the law taketh notice of him as of a perfect mant of the land instantly upon the death of his ancestor, specially where he is concerned with any stranger. He may mer into the land before admittance; may take the profits; mypunish any trespass done upon the ground (q); nay, upon hisfying the lord for his fine due upon the descent, may furunder into the hands of the lord to whatever use he pleases. for which reasons we may conclude, that the admittance of heir is principally for the benefit of the lord, to entitle him ohis fine, and not so much necessary for the strengthening and impleating the heir's title. Hence indeed an observation night arise, that if the benefit, which the heir is to receive by hadmittance, is not equal to the charges of the fine, he will never

⁽p) 4 Rep. 27. 1 Rep. 140.

^{(9) 4} Rep. 23.

never come in and be admitted to his copyhold in court; an fo the lord may be defrauded of his fine. But to this we ma reply in the words of fir Edward Coke (r), " I affure myfel " if it were in the election of the heir to be admitted or ne " to be admitted, he would be best contented without admit " tance; but the custom in every manor is in this point com " pulfory. For, either upon pain of forfeiture of their copy " holds, or of incurring some great penalty, the heirs of copy " holders are inforced, in every manor, to come into cou " and be admitted according to the custom, within a short " time after notice given of their ancestor's decease."

(r) Copyh, §. 41.

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CHAPTI

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the ir thi dpre ineig CHAPTER THE TWENTY THIRD.

OF ALIENATION BY DEVISE.

THE last method of conveying real property, is by devise, or disposition contained in a man's last will and testamt. And, in considering this subject, I shall not at present quire into the nature of wills and testaments, which are more operly the instruments to convey personal estates; but only to the original and antiquity of devising real estates by will, if the construction of the several statutes upon which that wer is now founded.

In seems sufficiently clear, that, before the conquest, lands redevisable by will (a). But, upon the introduction of the litary tenures, the restraint of devising lands naturally took at, as a branch of the seedal doctrine of non-alienation shout the consent of the lord (b). And some have question-swhether this restraint (which we may trace even from the stent Germans) (c) was not founded upon truer principles of stry, than the power of wantonly disinheriting the heir by and transferring the estate, through the dotage or caprice the ancestor, from those of his blood to utter strangers. It is alleged, maintained the ballance of property, aprevented one man from growing too big or powerful for streighbours; since it rarely happens, that the same man is heir

Wright of tenures. 172.

(b) See pag. 57.

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heir to many others, though by art and management he ma frequently become their devisee. Thus the antient law of the Athenians directed that the estate of the deceased should ways descend to his children; or, on failure of lineal descen dants, should go to the collateral relations: which had admirable effect in keeping up equality and preventing t accumulation of estates. But when Solon (d) made a slig alteration, by permitting them (though only on failure of iffu to dispose of their lands by testament, and devise away estat from the collateral heir, this foon produced an excess of weal in some, and of poverty in others: which, by a natural pr greffion, first produced popular tumults and diffentions; a these at length ended in tyranny, and the utter extinction liberty: which was quickly followed by a total subversion their state and nation. On the other hand, it would no feem hard, on account of some abuses (which are the natur consequence of free agency, when coupled with humaning mity) to debar the owner of lands from distributing them af his death, as the exigence of his family affairs, or the just due to his creditors, may perhaps require. And this pow if prudently managed, has with us a peculiar propriety; preventing the very evil which resulted from Solon's instit tion, the too great accumulation of property: which is natural confequence of our doctrine of fuccession by primo niture, to which the Athenians were strangers. Of this cumulation the ill effects were severely felt even in the feo times; but it should always be strongly discouraged in a co mercial country, whose welfare depends on the number moderate fortunes engaged in the extension of trade.

HOWEVER this be, we find that, by the common law England fince the conquest, no estate, greater than for term years, could be disposed of by testament (e); except only Kent, and in some antient burghs, and a few particular many where their Saxon immunities by special indulgence subsisted

⁽d) Plutarch. in vita Solon. (e) 2 Inst. 7. (f) Litt

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although the feodal restraint on alienations by deed vanished yearly, yet this on wills continued for some centuries after; an apprehension of infirmity and imposition on the testamentermis, which made such devises suspicious (g). Besindevises there was wanting that general notoriety, and lie designation of the successor, which in descents is appart to the neighbourhood, and which the simplicity of the minn law always required in every transfer and new action of property.

when ecclesiastical ingenuity had invented the doctrine is, as a thing distinct from the land, uses began to be deevery frequently (h), and the devisee of the use could in mery compel its execution. For it is observed by Gilt(j), that, as the popish clergy then generally sate in the nof chancery, they considered that men are most liberal nthey can enjoy their possessions no longer; and therefore kirdeath would choose to dispose of them to those, who, rding to the superstition of the times, could intercede for happiness in another world. But, when the statute of (1) had annexed the possession to the use, these uses, being the very land itself, became no longer deviseable: which thave occasioned a great revolution in the law of devises, not the statute of wills been made about five years after, 32 Hen. VIII. c. 1. explained by 34 Hen. VIII. c. 5. henacted, that all persons being seised in fee-simple (exfeme-coverts, infants, idiots, and persons of nonsane memight by will and testament in writing devise to any person, but not to bodies corporate, two thirds of their tenements, and hereditaments, held in chivalry, and the tof those held in socage: which now, through the alion of tenures, by the statute of Charles the second, unts to the whole of their landed property, except their hold tenements.

MPORATIONS were excepted in these statutes, to prevent thension of gifts in mortmain; but now, by construction of

Glanv. l. 7. c. 1. (h) Plowd. 414. (j) on de-

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of the statute 43 Eliz. c. 4. it is held, that a devise to a coporation for a charitable use is valid, as operating in the ture of an appointment, rather than of a bequest. And indeed piety of the judges hath formerly carried them great leng in supporting such charitable uses (k); it being held that statute of Elizabeth, which favours appointments to charitable all defects and repeals all former statutes (l), and so plies all defects of assurances (m): and therefore not on devise to a corporation, but a devise by a copyhold ten without surrendering to the use of his will (n), and a de (nay even a settlement) by tenant in tail without either or recovery, if made to a charitable use, are good by wa appointment (o).

WITH regard to devises in general, experience soon she how difficult and hazardous a thing it is, even in matte public utility, to depart from the rules of the common l which are fo nicely conftructed, and fo artificially conne together, that the least breach in any one of them difer for a time the texture of the whole. Innumerable fr and perjuries were quickly introduced by this parliamen method of inheritance: for so loose was the construction made upon this act by the courts of law, that bare not the hand writing of another person were allowed to be wills within the statute (p). To remedy which, the statu frauds and perjuries, 29 Car. II. c. 3. directs, that all vifes of lands and tenements shall not only be in writing figned by the testator, or some other person in his pres and by his express direction; and be subscribed, in his fence, by three or four credible witnesses. And a similar lemnity is requisite for revoking a devise.

In the construction of this last statute, it has been adjuthat the testator's name, written with his own hand, at the ginning of his will, as, "I John Mills do make this m

⁽k) Ch. Prec. 272. (l) Gilb. Rep. 45. 1 P. Wms. (m) Duke's charit. uses. 84. (n) Moor. 890. (o) 2 453. Ch. Prec. 16. (p) Dyer 72. Cro. Eliz. 100.

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will and testament," is a sufficient signing, without any me at the bottom (q); though the other is the fafer way. has also been determined, that though the witnesses must all the testator sign, or at least acknowlede the signing, vet may do it at different times (r). But they must all subtibe their names as witnesses in his presence, lest by any pos-Mity they should mistake the instrument (s). And, in one dedetermined by the court of king's-bench (t), the judges me extremely strict in regard to the credibility, or rather competency, of the witnesses; for they would not allow wlegatee, nor by consequence a creditor, where the legacies debts were charged on the real estate, to be a competent mess to the devise, as being too deeply concerned in interest nto wish the establishment of the will; for, if it were estathed, he gained a fecurity for his legacy or debt from the destate, whereas otherwise he had no claim but on the permalaffets. This determination however alarmed many pursfors and creditors, and threatened to shake most of the les in the kingdom, that depended on devises by will. For. the will was attested by a servant to whom wages were due, the apothecary or attorney whose very attendance made m creditors, or by the minister of the parish who had any mand for tithes or ecclefiastical dues, (and these are the perss most likely to be present in the testator's last illness) and in such case the testator had charged his real estate with the ment of his debts, the whole will, and every disposition mein, so far as related to real property, were held to be utby void. This occasioned the statute 25 Geo. II. c. 6. ich restored both the competency and the credit of fuch letus, by declaring void all legacies given to witnesses, and by removing all possibility of their interest affecting their imony. The fame ftatute likewise established the compeby of creditors, by directing the testimony of all such crebis to be admitted, but leaving their credit (like that of all the witnesses to be considered, on a view of all the circum-Vol. II. R and R and

⁽r) Freem. 486. 2 Ch. Cás. 109. Pr. Ch. 185. 1P. Wms. 740. (t) Stra. 1253.

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stances, by the court and jury before whom such will shall contested. And in a much later case (u) the testimony three witnesses, who were creditors, was held to be sufficient credible, though the land was charged with the payment debts; and the reasons of the former determination were ac judged to be insufficient.

ANOTHER inconvenience was found to attend this neemethod of conveyance by devise; in that creditors by bor and other specialties, which affected the bein provided he has affects by descent, were now defrauded of their securities, no having the same remedy against the devise of their debto. To obviate which, the statute 3 & 4 W. & M. c. 14. has provided, that all wills, and testaments, limitations, dispositions, and appointments of real estates, by tenants in section ple or having power to dispose by will, shall (as against succeditors only) be deemed to be fraudulent and void; and the such creditors may maintain their actions jointly against be the heir and the devisee.

A WILL of lands, made by the permission and under t control of these statutes, is considered by the courts of laws so much in the nature of a testament, as of a conveyance claring the uses to which the land shall be subject: with the difference, that in other conveyances the actual subscript of the witnesses is not required by law (w), though it is prude for them fo to do, in order to affift their memory when livin and to fupply their evidence when dead; but in devises lands fuch subscription is now absolutely necessary by statu in order to identify a conveyance, which in its nature never be fet up till after the death of the devisor. And up this notion, that a devise affecting lands is merely a species conveyance, is founded this diffinction between such dev and testaments of personal chattels; that the latter will open upon whatever the teflator dies possessed of, the former of upon fuch real estates as were his at the time so executing publishing his will (x). Wherefore no after-purchased las

(w) See pag. 30

⁽u) M. 31 Geo. II. 4 Barr. I. 430.

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pul pass under such devisee (y), unless, subsequent to the purchase or contract (z), the devisor re-publishes his will (a).

We have now considered the several species of common asirances, whereby a title to lands and tenements may be masserred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been hid down by courts of justice, for the construction and expotion of them all. These are,

- 1. THAT the construction be favourable, and as near the minds and apparent intents of the parties, as the rules of law mill admit (b). For the maxims of law are, that "werba intentioni debent in servire; and "benigne interpretamur chartas propter simplicitatem laicorum." And therefore the must also be reasonable, and agreeable to common understanding (c).
- 2. THAT quoties in werbis nulla est ambiguitas, ibi nulla positio contra werba sienda est (d): but that where the intensition is clear, too minute a stress be not laid on the strict and mais siend s
- 3. THAT the construction be made upon the entire deed, what merely upon disjointed parts of it. " Nam exantece-R 2 " dentibus

⁽g) Moor. 255. 11 Mod. 127. (z) 1 Ch. Caf. 39. 2 Ch. 4144. (a) Salk. 238. (b) And. 60. (c) 1 Bulftr. (d) 2 Saund. 157. (e) Hob. 27. (f) Rep. 133. Co. Litt. 223. 2 Show. 334.

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therefore that every part of it, be (if possible) made to tal effect; and no word but what may operate in some shape other (h). "Nam verba debent intelligi cum effectu, ut some magis valeat quam pereat (i)."

4. THAT the deed be taken most strongly against himth is the agent or contractor, and in favour of the other par " Verba fortius accipiunter contra proferentem." For principle of felf-preservation will make men sufficiently car ful, not to prejudice their own interest by the too extens meaning of their words; and hereby all manner of deceit any grant is avoided; for men would always affect ambigue and intricate expressions, provided they were afterwards at verty to put their own construction upon them. But her distinction must be taken between an indenture and a de poll: for the words of an indenture, executed by both parti are to be confidered as the words of them both; for, thou delivered as the words of one party, yet they are not his wo only, but the other party hath given his confent to every of them. But in a deed poll, executed only by the grant they are the words of the grantor only, and shall be take most strongly against him (k). However, this, being an of some strictness and rigour, is the last to be resorted to, is never to be relied upon, but where all other rules of ex fition fail (1).

5. THAT, if the words will bear two senses, one agrees to, and another against, law; that sense be preferred, whis most agreeable thereto (m). As if tenant in tail lets ale for life generally, it shall be construed for his own life on for that stands with the law; and not for the life of the see, which is beyond his power to grant.

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(g) 1 Bulftr. 101. (h) 1 P. Wms. 457. (i) Plowd. 1 (k) Ibid. 134. (l) Bacon's Elem. c. 3. (m) Co. Litt. 41. it

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6. THAT, in a deed, if there be two clauses so totally regnant to each other, that they cannot stand together, the of shall be received and the latter rejected (n): wherein it ffers from a will; for there, of two fuch repugnant clauses latter shall stand (o). Which is owing to the different atures of the two instruments; for the first deed, and the fwill are always most available in law. Yet in both cases e should rather attempt to reconcile them (p).

7. THAT a devise be most favourably expounded, to purhif possible the will of the devisor, who for want of advice learning may have omitted the legal and proper phrases. and therefore many times the law dispenses with the want of ords in devises, that are absolutely requisite in all other innments. Thus a fee may be conveyed without words of inmitance (q); and an estate-tail without words of procreain(r). By a will also an estate may pass by mere implicaon, without any express words to direct its course. As, here A devises lands to his heir at law, after the death of his ife: here, though no estate is given to the wife in express ms, yet she shall have an estate for life by implication (s); the intent of the testator is clearly to postpone the heir till ter her death; and if she does not take it, nobody else can. talfo, where a devise is of black-acre to A and of whiteat to B in tail, and if they both die without issue, then to in fee: here A and B have cross remainders by implicam, and on the failure of either's issue, the other or his issue all take the whole; and C's remainder over shall be postmed till the issue of both shall fail (t). But, to avoid contion, no cross remainders are allowed between more than odevisees (u): and, in general, where any implications tallowed, they must be such as are necessary (or at least R 3 highly

⁽n) Hardr. 94: (o) Co. Litt. 112. (p) Cro. Eliz. 420. Vern. 30. Vern. 30. (q) See pag. 108. (r) See pag. 115. (s) 1 (dtr. 376. (t) Freem. 484. (u) Cro. Jac. 655. 1 Venor. 1 Show. 13 9.

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highly probable) and not merely possible implications (w) And herein there is no distinction between the rules of law and of equity; for the will, being confidered in both court in the light of a limitation to uses (x), is construed in each with equal favour and benignity, and expounded rather onit own particular circumstances, than by any general rules of positive law.

AND thus we have taken a transient view, in this and the three preceding chapters, of a very large and diffusive subject the doctrine of common affurances: which concludes our ob fervations on the title to things real, or the means by which they may be reciprocally lost and acquired. We have before con fidered the effates which may be had in them, with regard t their duration or quantity of interest, the time of their en joyment, and the number and connexions of the persons en titled to hold them: we have examined the tenures, both at tient and modern, whereby those estates have been, and a now, holden: and have diftinguished the object of all these quiries, namely, things real, into the corporeal or substantia and incorporeal or ideal kind; and have thus confidered the rights of real property in every light wherein they are con templated by the laws of England. A system of laws, th differs much from every other system, except those of the fame feodal origin, in its notions and regulations of land estates; and which therefore could in this particular be very feldom compared with any other.

THE fubject, which has thus employed our attention, is of very extensive use, and of as extensive variety. And yet, am afraid, it has afforded the student less amusement and pleafure in the pursuit, than the matters discussed in the preceding volume. To fay the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time; the infinite determinations upon points that continually arife, and which have been heaped one upon another

⁽x) Fitzg. 236. 11 Mod. 153. (w) Vaugh. 262.

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ther for a course of seven centuries, without any order or method; and the multiplicity of acts of parliament which lave amended, or fometimes only altered, the common law; hele causes have made the study of this branch of our natioal jurisprudence a little perplexed and intricate. It hath been my endeavour principally to select such parts of it, as were the most general use, where the principles were the most imple, the reasons of them the most obvious, and the prache the least embarrassed. Yet I cannot presume that I have ways been thoroughly intelligible to fuch of my readers, as nere before strangers even to the very terms of art, which I bre been obliged to make use of: though, whenever those we first occurred, I have generally attempted a short expligion of their meaning. These are indeed the more numenus, on account of the different languages which our law has tdifferent periods been taught to speak; the difficulty ariing from which will infenfibly diminish by use and familiar quaintance. And therefore I shall close this branch of our equiries with the words of fir Edward Coke (y): " albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself, but proceed; for on some other day, in some other place," (or perhaps upon a second wisal of the same) " his doubts will be probably removed."

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CHAPTER THE TWENTY FOURTH.

OF THINGS PERSONAL

NDER the name of things personal are included a forts of things moveable, which may attend a man's pe fon wherever he goes; and therefore, being only the object of the law while they remain within the limits of its jurisdi tion, and being also of a perishable quality, are not esteem of fo high a nature, nor paid fo much regard to by the law, things that are in their nature more permanent and immov able, as lands, and houses, and the profits iffuing thereou These being constantly within the reach, and under the pr tection of the law, were the principal favourites of our fir legislators: who took all imaginable care in ascertaining t rights, and directing the disposition, of such property as the imagined to be lafting, and which would answer to posteri the trouble and pains that their ancestors employed about them; but at the fame time entertained a very low and con temptuous opinion of all personal estate, which they regard only as a transient commodity. The amount of it inde was, comparatively, very trifling, during the scarcity of money, and the ignorance of luxurious refinements, which prevailed in the feodal ages. Hence it was, that a tax of the fifteenth, tenth, or fometimes a much larger proportion of all the moveables of the subject, was frequently laid with out scruple, and is mentioned with much unconcern by our antient historians, though now it would justly alam our opulent merchants and stockholders. And hence likewife may be derived the frequent forfeitures inflicted by ne

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the common law, of all a man's goods and chattels, for mifbehaviours and inadvertencies that at present hardly seem to deserve so severe a punishment. Our antient law-books, which are founded upon the feodal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the mirror, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, feems principally borrowed from the civilians. But of later years, fince the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity and of course its value, we have learned to conreive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his really: and have adopted a more enlarged and less technical mode of confidering the one than the other; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well-grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving withal a due regard to antient usages, and a certain feodal tincture, which is still to be found in some branches of personal property.

But things personal, by our law, do not only include things moveable, but also something more: the whole of which is comprehended under the general name of chattels, utalla; which, fir Edward Coke says (a), is a French word sgnifying goods. And this is true, if understood of the Norman dialect; for in the grand coustumier (b), we find the word chattels used and set in opposition to a fief or feud: so that not only goods, but whatever was not a feud, were accounted chattels. And it is, I apprehend, in the same large, extended, negative sense, that our law adopts it; the idea of goods, or moveables only, being not sufficiently comprehensive to take in every thing that our law considers as a R 5 chattel

(a) 1 Inft. 118.

(b) c. 87.

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chattel interest. For fince, as the commentator on the coustumier observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place: whatever wants either of these qualities is not, according to the Normans an heritage or fief (c); or, according to us, is not a real estate: the consequence of which in both laws is, that it must be a personal estate, or chattel.

CHATTELS therefore are distributed by the law into two kinds; chattels real, and chattels personal.

1. CHATTELS real, faith fir Edward Coke (d), are such as concern, or favour of, the realty; as terms for years of land wardships in chivalry (while the military tenures subfisted the next presentation to a church, estates by statute-merchant ftatute-staple, elegit, or the like; of all which we have already spoken. And these are called real chattels, as being interefts iffuing out of, or annexed to real eftates : of which the have one quality, viz. immobility, which denominates them real; but want the other, viz. a fufficient, legal, indetermi nate duration: and this want it is, that constitutes then The utmost period for which they can last is fixed and determinate, either for fuch a space of time certain, or till fuch a particular fum of money be raifed out of fuch particular income; fo that they are not equal in the eye of the law to the lowest estate of freehold, , a lease for another' life: their tenants were considered, upon feodal principles as merely bailiffs or farmers; and the tenant of the freehold might at any time have deftroyed their interest, till the reig of Henry VIII (e). A freehold, which alone is a real estate and feems (as has been faid) to answer to the fief in Normandy is conveyed by corporal investiture and livery of seisin; which gives the tenant fo ftrong a hold of the land, that it neve after can be wrested from him during his life, but by his own act.

⁽c) Cateux font menbles et immeubles: sicomme vrais meubles sont qui transporter se peuveut et ensuivir le corps; immeubles sont chose qui ne peuvent ensuivir le corps, niest è transportees et tout ce qui ne est point en heritage. LL. Will Nothi, c. 4. apud Du Freluc. 11. 4-9.

(d) 1 Inst. 118.

(e) See pag. 141, 142.

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al, of voluntary transfer or of forfeiture; or else by the appening of some future contingency, as in estates pur auter ou, and the determinable freeholds mentioned in a former chapter (f). And even these, being of an uncertain duraion, may by possibility last for the owner's life; for the law not pre-suppose the contingency to happen before it actumy does, and till then the estate is to all intents and purwes a life estate, and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no feifin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it is fure to expire at a time prefixed and determined, if not sooner. lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estites by statutes and elegit are determined as soon as the debt spaid; and fo guardianships in chivalry were fure to expire the moment that the heir came of age. And if there be any ther chattel real, it will be found to correspond with the reft in this effential quality, that its duration is limited to a time certain, beyond which it cannot subsist.

2. CHATTELS personal are, properly and strictly speaking, sings moveable; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, houshold-hiff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been mavoidably led to consider the nature of chattels real, and their incidents, in the former chapters which were employed upon

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upon real estates: that kind of property being of a mongrel amphibious nature, originally endowed with one of the charafteristics of each species of things; the immobility of things real, and the precarious duration of things personal.

Chattel interests being thus distinguished and distributed it will be proper to consider, first, the nature of that property or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the title to that property, or how it may be lost and acquired. Of each of these in its order.

CHAPTER

CHAPTER THE TWENTY-FIFTH.

OF PROPERTY IN THINGS PERSONAL.

property, in chattels personal, may be either in posfession; which is where a man hath not only the right to poy, but hath an actual enjoyment of, the thing: or else is in action; where a man hath only a bare right, without sy occupation or enjoyment. And of these the former, or operty in possession, is divided into two sorts, an absolute of a qualified property.

I. First then of property in possession absolute; which is here a man hath, solely and exclusively, the right, and to the occpation, of any moveable chattels; so that they must be transferred from him, or cease to be his, without town act or default. Such may be all inanimate things, as ads, plate, money, jewels, implements of war, garments, the like; such also may be all vegetable productions, as fruit or other parts of a plant, when severed from the body it; or the whole plant itself, when severed from the ground; are of which can be moved out of the owner's possession thout his own act or consent, or at least without doing him injury, which it is the business of the law to prevent or needy. Of these therefore there remains little to be said.

But with regard to animals, which have in themselves a simple and power of motion, and (unless particularly contain convey themselves from one part of the world to another,

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another, there is a great difference made with respect to the feveral classes, not only in our law, but in the law of natur and of all civilized nations. They are diftinguished into fue as are domitae, and fuch as are ferae naturae; fome being a tame, and others of a wild disposition. In such as are of nature tame and domestic, (as horses, kine, sheep, poultr and the like) a man may have as absolute a property as in an inanimate things; because these continue perpetually in h occupation, and will not stray from his house or person, unle by accident or fraudulent enticement, in either of which call the owner does not lose his property (a): in which our la agrees with the laws of France and Holland (b). The ftea ing, or forcible abduction, of fuch property as this, is al felony; for these are things of intrinsic value, serving fort food of man, or else for the uses of husbandry (c). But animals ferae nature a man can have no absolute property

OF all tame and domestic animals, the brood belongs the owner of the dam or mother; the English law agreein with the civil, that " partus sequitur ventrem" in the bru creation, though for the most part in the human species difallows that maxim. And therefore inthe laws of Engla (d), as well as Rome (e), " si equam meam equus tuus prae " nantem fecerit, non est tuum sed meum quod natum est And, for this, Puffendorf (f) gives a sensible reason: only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless the proprietor, and must be maintained with greater expe and care: wherefore as her owner is the lofer by her pre nancy, he ought to be the gainer by her brood. An exce tion to this rule is in the case of young cygnets; which I long equally to the owner of the cock and hen, and shall divided between them (g). But here the reasons of the gene

⁽a) 2 Mod. 319. (b) Vinn. in Inst. 1. 2. tit. 1. §. 15. (c) Hal. P. C. 511, 512. (d) Bro. Abr. tit. Propertie. 29. (e) 6. 1. 5. (f) L. of N. l. 4. c. 7. (g) 7 Rep. 17.

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h. 25. lecease, and " cessante ratione cessat et ipsa lex :" for the male well known, by his conftant affociation with the female; for the same reason the owner of the one doth not suffer me disadvantage, during the time of pregnancy and nurthan the owner of the other.

I. OTHER animals, that are not of a tame and domestic me, are either not the objects of property at all, or else Junder our other division, namely, that of qualified, limited, special property: which is fuch as is not in its nature perment, but may fometimes subsist, and at other times not iff. In discussing which subject, I shall in the first place w, how this species of property may subfift in such animals me ferae naturae, or of a wild nature; and then, how it while in any other things, when under particular circuminces.

first then, a man may be invested with a qualified, but tan absolute, property in all creatures that are ferae natuu, either per industriam, propter impotentiam, or propter wilegium.

1. A QUALIFIED property may subsist in animals ferae turae, per industriam bominis: by a man's reclaiming and ting them tame by art, industry, and education; or by fo thing them within his own immediate power, that they mot escape and use their natural liberty. And under this d some writers have ranked all the former species of aniis we have mentioned, apprehending none to be originally naturally tame, but only made fo by art and custom: horses, swine, and other cattle; which, if originally to themselves, would have chosen to rove up and down, ting their food at large, and are only made domestic by and familiarity, and are therefore, fay they, called manla, quasi manui, assueta. But however well this notion may bunded, abstractedly confidered, our law apprehends the hobvious distinction to be, between such animals as we erally fee tame, and are therefore feldom, if ever, found dering at large, which it calls domitae naturae; and fuch latures as are usually found at liberty, which are therefore fupposed

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fupposed to be more emphatically ferae naturae, though may happen that the latter shall be sometimes tamed and co fined by the art and industry of man. Such as are deer i park, hares or rabbets in an inclosed warren, doves in dovehouse, pheasants or partridges in a mew, hawks that fed and commanded by their owner, and fish in a priv pond or in trunks. These are no longer the property man, than while they continue in his keeping or actual n fession: but, if at any time they regain their natural liber his property instantly ceases; unless they have animum rev tendi, which is only to be known by their usual custom of turning (h). A maxim which is borrowed from the civil (i); " revertendi animum videntur definere habere tunc, revertendi consuetudinem deseruerint." The law therefore tends this possession farther than the mere manual occupati for my tame hawk that is pursuing his quarry in my presen though he is at liberty to go where he pleases, is neverthele my property; for he hath animum revertendi. So are pigeons, that are flying at a distance from their home (e cially of the carrier kind) and likewise the deer that is chall sty, to out of my park or forest, and is instantly pursued by the keep sis, and or forester: all which remain still in my possession, and I preserve my qualified property in them. But if they the gat la without my knowlege, and do-not return in the usual man wagai. ner, it is then lawful for any stranger to take them (k). It is the if a deer, or any wild animal reclaimed, hath a collar or of id or mark put upon him, and goes and returns at his pleasure tion or or if a wild swan is taken, and marked and turned loose in the: at river, the owner's property in him still continues, and it im from not lawful for any one else to take him (1): but otherwisch fel if the deer has been long absent without returning, for foot the swan leaves the neighbourhood. Bees also are ware naturae; but, when hived and reclaimed, a man as, can have a qualified property in them, by the law of a lie is not the control of the same and the s ture, as well as by the civil law (m). And to the far mer (s)

⁽h) Bracton. 1.2. c. 1. 7 Rep. 17. (i) Inst 2.1. 15. (k) Find 11.2. L. 177. (1) Crompt. of courts, 167. 7 Rep. 16. 4. c. 6. §. 5. Inft. 2. 1. 14.

upole, not to fay in the same words, with the civil law, taks Bracton (n): occupation, that is, hiving or including m, gives the property in bees; for, though a fwarm lights non my tree, I have no more property in them till I have med them, than I have in the birds which make their nests breon: and therefore if another hives them, he shall be hir proprietor: but a fwarm, which fly from and out of my ire, are mine so long as I can keep them in fight, and have ower to purfue them; and in these circumstances no one else sentitled to take them. But it hath been also said (o), that ith us the only ownership in bees is ratione soli; and the larter of the forest (p), which allows every freeman to be nitled to the honey found within his own woods, affords nat countenance to this doctrine, that a qualified property by be had in bees, in confideration of the property of the whereon they are found.

In all these creatures, reclaimed from the wildness of their ture, the property is not absolute, but defeasible: a proty, that may be destroyed if they resume their antient wildis, and are found at large. For if the pheasants escape from mew, or the fishes from the trunk, and are seen wandergat large in their proper element, they become ferae natuvagain; and are free and open to the first occupant that has lity to feife them. But while they thus continue my quaed or defeafible property, they are as much under the protion of the law, as if they were absolutely and indefeasibly ne: and an action will lie against any man that detains m from me, or unlawfully destroys them. th felony by the common law to steal such of them as are for food, as it is to steal tame animals (q): but not so, if gare only kept for pleasure, curiosity, or whim, as dogs, s, cats, apes, parrots, and finging birds (r); because their leis not intrinsic, but depending only on the caprice of the ner(s): though it is such an invasion of property, as may amount

⁽a) Bro. Abr. tit. propertie. 37. cites 43 (b) Bro. Abr. tit. propertie. 37. cites 43 (c) Bro. Abr. tit. propertie. 37. cites 43 (d) 1 Hal. P. C. 512. lamb. Eiren. 275. (s) 7 Rep. 18. 3 Infl. 109.

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amount to a civil injury, and be redressed by a civil action (t) Yet to steal a reclaimed hawk is felony both by common law and statute (u); which seems to be a relic of the tyranny of our antient sportsmen. And, among our elder ancestors the antient Britons, another species of reclaimed animals, via cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the king houshold, and was the custos borrei regii, for which there was a very peculiar forfeiture (w). And thus much of qualified property in wild animals, reclaimed per industriam.

- 2. A QUALIFIED property may also subsist with relation to animals ferae naturae, ratione impotentiae, on account of their own inability. As when hawks, herons, or other bird build in my trees, or coneys or other creatures make the nests or burrows in my land, and have young ones there; have a qualified property in those young ones, till such time as they can fly, or run away, and then my property expire (x): but, till then, it is in some cases trespass, and in other felony, for a stranger to take them away (y). For here, at the owner of the land has it in his power to do what he please with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones reclaimed and confined: for these cannot through weakness any more than the others through restraint, use their natural liberty and forsake him.
- 3. A MAN may, lastly, have a qualified property in animal feræ naturæ, propter privilegium: that is, he may have the privilege of hunting, taking and killing them, in exclusion of other person.

⁽t) Bro. Abr. tit. Trespass. 407. (u) i Hal. P. C. 512. Hawk. P. C. c. 33. (w) "Si quis felem, horreit regit custodes, "occiderit wel furto abstulerit, felis summa canda suspendatur, ce pite aream attingente, et in eam grana tritici effundantur, usque dum summitas caudae tritico co-operiatur." Wotton. LL. Wall. 3. c. 5. §. 5. An amercement similar to which, fir Edward Cole tells us (7 Rep. 18.) there antiently was for stealing swans; on suspending them by the head, instead of the tail. (x) Carta de forest. 9 Hen. III. c. 13. (y) 7 Rep. 17 Lamb. Eiren. 27

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gions. Here he has a transient property in these animals, hally called game, so long as they continue within his liberty y and may restrain any stranger from taking them therebut the instant they depart into another liberty, this quaind property ceases. The manner, in which this privilege acquired, will be shewn in a subsequent chapter.

THE qualified property which we have hitherto confidered, ntends only to animals fera natura, when either reclaimed, motent, or privileged. Many other things may also be the biects of qualified property. It may subsist in the very elemts, of fire or light, of air, and of water. A man can have pabsolute permanent property in these, as he may in the ath and land; fince these are of a vague and fugitive nature, nd therefore can admit only of a precarious and qualified mership, which lasts so long as they are in actual use and mupation, but no longer. If a man disturbs another, and me prives him of the lawful enjoyment of these; if one obstructs nother's antient windows (a), corrupts the air of his house er gardens (b), fouls his water (c), or unpens or lets it out, or he diverts an antient watercourse that used to run to the her's mill or meadow (d); the law will animadvert hereon an injury, and protect the party injured in his possession. at the property in them ceases the instant they are out of Meffion: for, when no man is engaged in their actual occution, they become again common, and every man has an mal right to appropriate them to his own use.

THESE kinds of qualification in property depend upon the kuliar circumstances of the subject matter, which is not cable of being under the absolute dominion of any proprietor. property may also be of a qualified or special nature, on wunt of the peculiar circumstances of the owner, when the ingitself is very capable of absolute ownership. As in case

⁽¹⁾ Cro. Car. 554. Mar. 48. 5. Mod. 376. 12 Mod. 144. 45. 58. (b) Ibid. 59. Lutw. 92. (c) 9 Rep. 59. (a) 9 (b) Ibid. 59. Lutw. 92. (c) 9 Rep. 59. (d) I ton, 273. Skin. 389.

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of bailment, or delivery, of goods to another person for a part cular use; as to a carrier to convey to London, to an innkeep to fecure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person deliver ing, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee had the possession, and only a temporary right. But it is a qual fied property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the baile on account of his immediate possession; the bailor, because the possession of the bailee is, mediately, his possession also (e So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, pro perty therein: the pledgor's property is conditional, and depends upon the performance of the condition of re-paymen &c. and so too is that of the pledgee, which depends upon i non-performance (f). The same may be said of goods dis treined for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolu property of either the distreinor, or party distreined; but ma be redeemed, or else forfeited, by the subsequent conducte But a fervant, who hath the care of his mafter the latter. goods or chattels, as a butler of plate, a shepherd of sheep and the like, hath not any property or possession either abso lute or qualified, but only a mere charge or overlight (g)

HAVING thus considered the several divisions of property in possession, which subsists there only, where a man hath both the right and also the occupation of the thing: we will proceed next to take a short view of the nature of property in action, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at laws from

⁽e) 1 Roll. Abr. 607. (f) Cro. Jac. 245. (g) 3 Inft. 10

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from whence the thing fo recoverable is called a thing, or the, in action (h). Thus money due on a bond is a chose in thion; for a property in the debt vests at the time of forfeime mentioned in the obligation, but there is no possession till movered by course of law. If a man promises, or covenants min me, to do any act, and fails in it, whereby I suffer damge; the recompense for this damage is a chose in action: in though a right to some recompense vests in me, at the time the damage done, yet what and how large fuch recompense hall be, can only be afcertained by verdict; and the poffession an only be given me by legal judgment and execution. In beformer of these cases the student will observe, that the poperty, or right of action, depends upon an express contract mobligation to pay a stated sum: and in the latter it depends mon an implied contract, that if the covenantor does not perom the act he engaged to do, he shall pay me the damages Instain by this breach of covenant. And hence it may be ollected, that all property in action depends entirely upon mtracts, either express or implied; which are the only replar means of acquiring a chose in action, and of the nature which we shall discourse at large in a subsequent chapter.

At present we have only to remark, that upon all contracts rpromises, either express or implied, and the infinite variety scales into which they are and may be spun out, the law gives a action of some fort or other to the party injured in case of tom-performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the ting, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a time in action; being a thing-rather in potentia than in essential though

⁽h) The same idea, and the same denomination, of property prebled in the civil law. "Rem in bonis nostris habere intelligimur, quotiens od reciperandum eam actionem habeamus." (Ff. 41. 1. 4) And again: " æque bonis adnumerabistre etiam, si quid est in actionibus, petitionibus, persecutionibus. Nam et kæc in bonis esse "videntur." (Ff. 50. 16. 59.)

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though the owner may have as absolute a property in, and as well entitled to, such things in action, as to things in possible.

AND, having thus distinguished the different degree or quatity of dominion or property to which things personal are su ject, we may add a word or two concerning the time of the enjoyment, and the number of their owners; in conformity the method before observed in treating of the property things real.

FIRST, as to the time of enjoyment. By the rules of antient common law, there could be no future property, take place in expectancy, created in personal goods and ch tels; because, being things transitory, and by many accide fubject to be loft, destroyed, or otherwise impaired, and exigencies of trade requiring also a frequent circulation the of, it would occasion perpetual suits and quarrels, and pu stop to the freedom of commerce, if fuch limitations in mainder were generally tolerated and allowed. But yet in wills and testaments such limitations of personal goods chattels, in remainder after a bequest for life, were perm ted (i); though originally that indulgence was only they when merely the use of the goods, and not the goods the felves, was given to the first legatee (k); the property be supposed to continue all the time in the executor of the visor. But now that distinction is disregarded (1): and the fore if a man either by deed or will limits his books or fur ture to A for life, with remainder over to B, this remain is good. But, where an estate-tail in things personal is ven to the first or any subsequent possessor, it vests in him total property, and no remainder over shall be permitted or fuch a limitation (m). For this, if allowed, would tend we perpetuity, as the devisee or grantee in tail of a chattel no method of barring the entail; and therefore the law velt in him at once the entire dominion of the goods, being analogous to the fee-simple which a tenant in tail may acquire in a real eftate.

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⁽i) 1 Equ. Caf. abr. 360. (k) Mar. 106. (l) 2 Freen. 206. (m) 1 P. Wms. 290.

NEXT, as to the number of owners. Things personal may long to their owners, not only in feveralty, but also in int-tenancy and in common, as well as real effates. They anot indeed be vested in coparcenary; because they do not kend from the ancestor to the heir, which is necessary to aftitute coparceners. But if a horse, or other personal uttel, be given to two or more, absolutely, they are joint-teats thereof; and, unless the jointure be severed, the same frine of furvivorship shall take place as in estates of lands tenements (n). And, in like manner, if the jointure be ared, as by either of them felling his share, the vendee and remaining part-owner shall be tenants in common, withtany jus accrescendi or survivorship (o). So also if rool. given by will to two or more, equally to be divided bemen them, this makes them tenants in common (p); as. have formerly feen (q), the fame words would have done, ngard to real estates. But, for the encouragement of hufdry and trade, it is held that a stock on a farm, though upied jointly, and also a stock used in a joint undertaking way of partnership in trade, shall always be considered as mmon and not as joint property; and there shall be no sur-orship therein (r).

(a) Litt. §. 282. 1 Vern. 482. (b) Litt. §. 321. (c) 1 Caf. abr. 292. (c) pag. 193. (c) 1 Vern. 217. Co. 1.182.

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CHAPTER THE TWENTY SIXTH.

OF TITLE TO THINGS PERSONAL I

WE are next to consider the title to things personal, the various means of acquiring, and of losing, so property as may be had therein: both which considerations gain and loss shall be blended together in one and the saview as was done in our observations upon real proper since it is for the most part impossible to contemplate the without contemplating the other also. And these methods acquisition or loss are principally twelve: 1. By occupant. By prerogative. 3. By forfeiture. 4. By custom. 5. succession. 6. By marriage. 7. By judgment. 8. By gas 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

And, first, a property in goods and chattels may be acquired by occupancy: which, we have more than once (a) remarks was the original and only primitive method of acquiring a property at all; but which has since been restrained and about ged, by the positive laws of society, in order to maintain per and harmony among mankind. For this purpose, by the law of England, gifts, and contracts, testaments, legacies, and administrations have been introduced and countenanced, order to transfer and continue that property and possession things personal, which has once been acquired by the owns

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ed lion i And, where fuch things are found without any other owner, mey for the most part belong to the king by virtue of his prengative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subfift, and which we are now to confider.

1. THUS, in the first place, it hath been faid, that any body may seise to his own use such goods as belong to an alien nemy (b). For fuch enemies, not being looked upon as members of our fociety, are not entitled during their state of mity to the benefit or protection of the laws: and therefore every man that has opportunity is permitted to feise upon heir chattels, without being compelled as in other cases to make restitution or satisfaction to the owner. But this, howmer generally laid down by some of our writers, must in reain and justice be restrained to such captors as are authorized with public authority of the state, residing in the crown (c); nd to fuch goods as are brought into this country by an alien nemy, after a declaration of war, without a safe-conduct spaffport. And therefore it hath been holden (d), that where foreigner is refident in England, and afterwards a war breaks mtbetween his country and ours, his goods are not liable to e seised. It hath also been adjudged, that if an enemy take begoods of an Englishman, which are afterwards retaken by nother subject of this kingdom, the former owner shall lose is property therein, and it shall be indefeasibly vested in the kond taker; unless they were retaken the same day, and the wner before funfet puts in his claim of property (e). Which agreeable to the law of nations, as understood in the time of frotius (f), even with regard to captures made at sea; which we held to be the property of the captors after a possession twenty four hours: though the modern authorities (g) repire, that before the property can be changed the goods VOL. II.

⁽b) Finch. L. 178. (c) Freem. 40. (d) Bro. Abr. tit. ropertie. 38. forfeiture. 57. (e) Ibid. (f) de. j. b. &c. p. 1. 10.6. 9. 3. (g) Bynkersh, quaest. jur. publ. l. 4. Rocc. de. Afdur. not. 66.

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must have been brought into port, and have continued night intra praesidia, in a place of safe custody, so that a hope of recovering them was lost.

AND, as in the goods of an enemy, so also in his person, man may acquire a fort of qualified property, by taking his a prisoner in war (h); at least till his ransom be paid (j). An this doctrine seems to have been extended to negro-servan (i), who are purchased, when captives, of the nations with whom they are at war, and continue therefore in some degree the property of their masters who buy them: though, accurately speaking, that property consists rather in the perpetus service, than in the body or person, of the captive (k).

- 2. Thus again, whatever moveables are found upon the furface of the earth, or in the sea, and are unclaimed by an owner, are supposed to be abandoned by the last proprieto and as such, are returned into the common stock and mass things: and therefore they belong, as in a state of nature to the first occupant or fortunate sinder, unless they sawithin the description of waifs, or estrays, or wreck, or his den treasure; for these, we have formerly seen (1), are vested by law in the king, and form a part of the ordinary reven of the crown.
- 3. Thus too the benefit of the elements, the light, tair, and the water, can only be appropriated by occupant If I have an antient window overlooking my neighbour ground, he may not erect any blind to obstruct the light: b if I build my house close to his wall, which darkens it, I canot compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbour makes

⁽h) Bro. Abr. tit. propertie. 18. (j) We meet with a crious writ of trespass in the register (102) for breaking a mathouse, and setting such a prisoner at large. "Quare domum is A. apud W. (in qua idem A. quendam H. Scotum per ipsum de guerra captum tanquam prisonem suum, quousque sibi de cent libris, per quas idem H. redemptionem suam cum praesato A. wita sua salvanda secerat satisfactum soret, detinuit) fresit, et sum H. cepit et abduxit, vel quo voluit abire permisit, & (i) 2 Lev. 201. (k) Carth. 396. Ld. Raym. 147. Salva. (l) Book I. ch. 8.

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m-yard, so as to annoy and render less salubrious the air of my-house or gardens, the law will furnish me with a remey; but if he is first in possession of the air, and I six my haintion near him, the nusance is of my own seeking, and may
minue. If a stream be unoccupied, I may erect a mill
ireon, and detain the water; yet not so as to injure my
sighbour's prior mill, or his meadow: for he hath by the
stroccupancy acquired a property in the current.

4 WITH regard likewise to animals ferae naturae, all mkind had by the original grant of the creator a right to rfue and take any towl or infect of the air, any fifth or inbitant of the waters, and any beaft or reptile of the field: dthis natural right still continues in every individual, unswhere it is restrained by the civil laws of the country. And ben a man has once so seised them, they become while livthis qualified property, or, if dead, are absolutely his own: that to fteal them, or otherwise invade this property, is acming to the respective values, sometimes a criminal offence. metimes only a civil injury. The restrictions which are upon this right, by the laws of England, relate princily to royal fish, as whale and sturgeon, and such terrestial. ial, or aquatic animals as go under the denomination of me; the taking of which is made the exclusive right of the ince, and fuch of his fubjects to whom he has granted the peroyal privilege. But those animals, which are not extisly so reserved, are still liable to be taken and appropriaby any of the king's subjects, upon their own territories; the fame manner, as they might have taken even game ittill these civil prohibitions were issued: there being in ture no distinction between one species of wild animals and other, between the right of acquiring property in a hare or quirrel, in a partridge or a butterfly: but the difference, at tent made, arises merely from the positive municipal law.

To this principle of occupancy also must be referred the thod of acquiring a special personal property in corn grows on the ground, or other emblements, by any possessor of

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the land who hath fown or planted it, whether he be own of the inheritance in fee or in tail, or be tenant for life, f years, or at will: which emblements are diffinct from the real estate in the land, and subject to many, though not a the incidents attending personal chattels. They were devil ble by testament before the statute of wills (m), and at t death of the owner shall vest in his executor and not his hei they are forfeitable by outlawry in a personal action (n): a by the statute 11 Geo. IJ. c. 19. though not by the comm law (o), they may be distreined for rent arrere. The reas for admitting the acquisition of this special property, by nants who have temporary interests, was formerly given (and it was extended to tenants in fee, principally for the nefit of their creditors: and therefore, though the emb ments are affets in the hands of the executor, are forfeital upon outlawry, and distreinable for rent, they are not in oth respects considered as personal chattels; and, particular they are not the object of larciny, before they are fever from the ground (q).

6. The doctrine of property arising from accession is a grounded on the right of occupancy. By the the Roman law any given corporeal substance received afterwards an access by natural or by artificial means, as by the growth of ve tables, the pregnancy of animals, the embroidering of clo or the conversion of wood or metal into vessels and utent the original owner of the thing was entitled by his right possession to the property of it under such its state of impro ment (r): but if the thing itself, by such operation, changed into a different species, as by making wine, oil bread, out of another's grapes, olives, or wheat, it belonged the new operator; who was only to make a fatisfaction to former proprietor for the materials, which he had so conve (s). And these doctrines are implicitly copied and ador by our Bracton (t), in the reign of king Henry III; and h

⁽n) Bro. Abr. tit emblements. 2 (m) Park, §. 512. (n) Bro. Abr. 111 cm. m. (n) Bro. Abr. 111 cm. (n) Park, §. 512. (n) Bro. Abr. 666. (p) pag. 122. 146. Rep. 116. (s) (r) Inft. 2. 1. 25, 26. 31, Ff. 6. 1. 5. 3 Inft. 109. (t) 1. 2. c. 2. 8 3. 2. 1. 25. 34.

thath been held, that if one takes away another's wife or in, and cloaths them, and afterwards the husband or father takes them back, the garments shall cease to be the protty of him who provided them, being now annexed to the fon of the child or woman (w).

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7. But in case of confusion of goods, where those of two fons are so intermixed, that the several portions can be no ger distinguished, the English law partly agrees with, and rly differs from, the civil. If the intermixture be by conat, I apprehend that in both laws the proprietors have an trest in common, in proportion to their respective shares But, if one willfully intermixes his money, corn, or y, with that of another man, without his approbation or owlege, or casts gold in like manner into another's meltingtor crucible, the civil law, though it gives the fole proty of the whole to him who has not interfered in the mixn, yet allows a fatisfaction to the other for what he has fo providently loft (y). But our law, to guard against fraud, lows no remedy in fuch a case; but gives the entire property, thout any account, to him, whose original dominion is inded, and endeavoured to be rendered uncertain, without sown consent_(z).

R. THERE is still another species of property, which, begrounded on labour and invention, is more properly reduleto the head of occupancy than any other; since the right
secupancy itself is supposed by Mr. Locke (a), and many
lets (b), to be founded on the personal labour of the occulet. And this is the right, which an author may be supled to have in his own original literary compositions: so
the other person without his leave may publish or make
that of the copies. When a man by the exertion of his raled powers has produced an original work, he has clearly
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⁽w) Bro. Abr. tit. profertie. 23. Moor. 20. Poph. 38. (w)
M. 214. (x) Inst. 2. 1. 27, 28. 1 Vern. 217. (y) Inst.
1.28. (z) Poph. 38. 2 Bulstr. 325. Hal. P. C. 513.
Men. 516. (a) on Gov. part. 2. ch. 5. (b) See pag. 8.

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a right to dispose of that identical work as he pleases, and an attempt to take it from him, or vary the disposition he ha made of it, is an invasion of his right of property. Now th identity of a literary composition consists entirely in the fer timent and the language; the fame conceptions, cloathed i the fame words, must necessarily be the same composition and whatever method be taken of conveying that composition to the ear or eye of another, by recital, by writing, or b printing, in any number of copies or at any period of time, is always the identical work of the author which is fo con veyed; and no other man can have a right to convey or tran fer it without his confent, either tacitly or expressly give This confent may perhaps be tacitly given, when an author permits his work to be published, without any reserve right, and without stamping on it any marks of ownership it is then a present to the public, like the building of a church or the laying out a new highway: but, in case of a barga for a fingle impression, or a fale or gift, of the copyright, t reversion is plainly continued in the original proprietor, or the whole property transferred to another.

THE Roman law adjudged, that if one man wrote are thing, though ever so elegantly, on the paper or parchane of another, the writing should belong to the original own of the materials on which it was written (c): meaning certainly nothing more thereby, than the mere mechanical operation of writing, for which it directed the scribe to receive a satisfaction; especially as, in works of genius and invention such as a picture painted on another man's canvas, the same law (d) gave the canvas to the painter. We find no other mention in the civil law of any property in the works of the understanding, though the sale of literary copies, for the purposes of recital or multiplication, is certainly as antient the times of Terence (e), Martial (f), and Statius (g). Neith with us in England hath there been any final (h) determine

⁽c) Si in chartis membranis we tuis carmen wel bistoriam welo tionem titius scripferit, hujus corporis non Titius sed tu dominus wideris. Inst 2. 1. 33. (d) Ibid. § 34. (e) Prol. in Eunu 20. (f) Epigr 1. 67. iv. 72. xiii. 3. xiv. 194. (g) yii. 83. (h) In the case of Millar and Taylor in B. R. Pa

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not upon the right of authors at the common law. But much may be gathered from the frequent injunctions of the court of chancery, prohibiting the invasion of this property: specially where either the injunctions have been perpetual (i), whave related to unpublished manuscripts (k), or to such anient books, as were not within the provisions of the statute of queen Anne (1). Much may also be collected from the several legislative recognitions of copyrights (m); and from those adjudged cases at common law, wherein the crown hath been considered as invested with certain prerogative copyights (n); for, if the crown is capable of an exclusive right many one book, the subject seems also capable of having the same right in another.

But, exclusive of such copyright as may subsist by the rules of the common law, the statute 8 Ann. c. 19. hath protected by additional penalties the property of authors and their assigns for the term of fourteen years; and hath directed that if, at the end of that term, the author himself be living, the right hall then return to him for another term of the same duration: and a similar privilege is extended to the inventors of prints and engravings, for the term of eight and twenty years, by the statutes 8 Geo. II. c. 13. and 7 Geo. III. c. 38. All which prear to have been suggested by the exception in the statute statute statute of some statutes of same inventor of a same statute, for the sole working or making of the same; by virtue whereof a temporary property becomes ves-

d in the patentee (o).

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CHAPTER

Geo. III. (it was determined upon folemn argument and great infideration) by the opinion of three judges against one, that an adultive copyright in authors subsists by the common law. But a into ferror hath been since brought in the exchequer chamber, to me the sense of the rest of the judges upon this nice and importing that the sense of the rest of the judges upon this nice and importing that the sense of the rest of the judges upon this nice and importing that the sense of the rest of the judges upon this nice and importing that the sense of the rest of the judges upon this nice and importing that the sense of the rest of the judges upon this nice and importing the sense of the rest of the judges upon this nice and importing the sense of the sens

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CHAPTER THE TWENTY SEVENTH.

OF TITLE BY PREROGATIVE, AN FORFEITURE.

A SECOND method of acquiring property in persons chattels is by the king's prerogative: whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown, as by a grant or by prescription.

SUCH in the first place are all tributes, taxes, and customs whether constitutionally inherent in the crown, as flowers the prerogative and branches of the census regalis or antien royal revenue, or whether they be occasionally created b authority of parliament; of both which species of revenue w treated largely in the former volume. In these the king ac quires and the subject loses a property the instant they becom due: if paid, they are a chose in possession; if unpaid, chose in action. Hither also may be referred all forfeitures fines, and amercements due to the king, which accrue b virtue of his antient prerogative, or by particular modern fta tutes: which revenues created by statute do always assimi late, or take the same nature, with the antient revenues; an may therefore be looked upon as arising from a kind of artifl cial or secondary prerogative. And, in either case, the owne of the thing forfeited, and the person fined or amerced, d lose and part with the property of the forfeiture, fine, of amercement, the instant the king or his grantee acquires it

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In these several methods of acquiring property by prerogaire there is also this peculiar quality, that the king cannot lave a joint property with any person in one entire chattel, or ach a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king hall have the whole : in like manner as the king can, neither by grant nor contract, become a joint-tenant of a chattel real with another person (a); but by such grant or contract shall ecome entitled to the whole in feveralty. Thus, if a horse egiven to the king and a private person, the king shall have he fole property: if a bond be made to the king and a subject, heking shall have the whole penalty; the debt or duty being me fingle chattel (b): and fo, if two persons have the property fa horse between them, or have a joint debt owing them on and one of them affigns his part to the king, or is atinted, whereby his moiety is forfeited to the crown; the ing shall have the entire horse, and entire debt (c). For, as tis not confistent with the dignity of the crown to be partur with a subject, so neither does the king ever lose his right any instance: but, where they interfere, his is always prebred to that of another person (d): from which two princiis it is a necessary consequence, that the innocent, though mortunate, partner must lose his share in both the debt and tehorse, or in any chattel in the same circumstances.

This doctrine has no opportunity to take place in certain ther instances of title by prerogative, that remain to be menmed; as the chattels thereby vested are originally and solely sted in the crown, without any transfer or derivative assigntent either by deed or law from any former proprietor. Such the acquisition of property in wreck, in treasure-trove, in mis, in estrays, in royal sish, in swans, and the like; which a not transferred to the sovereign from any former owner,

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⁽b) See pag. 184. (b) Fitzh. Abr. tit. dette. 38. Plowd. (c) Cro. Eliz. 263. Plowd. 323. Finch. Law. 178. Mcd. 245. (d) Co. Litt, 30.

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but are originally inherent in him by the rules of law, and ar derived to particular subjects, as royal franchises by his bounty. These are ascribed to him, partly upon the particular reason mentioned in the eighth chapter of the former book; an partly upon the general principle of their being bona vacan tia, and therefore vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safet and ornament of the commonwealth.

WITH regard to the prerogative copyrights, which wer mentioned in the preceding chapter, they are held to be vefte in the crown upon different reasons. Thus, 1. The king, the executive magistrate, has the right of promulging to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own prefs, or that of h grantees, all acts of parliament, proclamations, and orders council. 2. As supreme head of the church, he hath a right to the publication of all liturgies and books of divine fervin 3. He hath a right by purchase to the copies of such lawbook grammars, and other compositions, as were compiled translated at the expense of the crown. And upon these to last principles the exclusive right of printing the translation the bible is founded. 4. Almanacks have been faid to be pren gative-copies, either as things develict, or elfe as being ful stantially nothing more than the calendar prefixed to our turgy (e). And indeed the regulation of time has been oft considered as a matter of state. The Roman fasti were und the care of the pontifical college: and Romulus, Numa, at Julius Cæfar, fuccessively regulated the Roman calendar.

THERE still remains another species of prerogative propert founded upon a very different principle from any that ha been mentioned before; the property of such animals for naturae, as are known by the denomination of game, wi the right of pursuing, taking, and destroying them: which vested in the king alone, and from him derived to such of h th

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inbjects as have received the grants of a chase, a park, a free surren, or free fishery. This may lead us into an enquiry incerning the original of these franchises, or royalties, on which we touched a little in a former chapter (f); the right itself being an incorporeal hereditament, though the fruits and profits of it are of a personal nature.

In the first place then we have already shewn, and indeed trannot be denied, that by the law of nature every man, from heprince to the peafant, hath an equal right of pursuing, and sking to his own use, all such creatures as are ferae naturae, and therefore the property of nobody, but liable to be seised with first occupant. And so it was held by the imperial law, men so late as Justinian's time : " ferae igitur bestiae, et volucres, et omnia animalia quae mari, coelo, et terra noscuntur, simul atque ab aliquo capta fuerint, jure gentium sta-"tim illius esse incipiunt. Quod enim nullius est, id naturali ratione occupanti conceditur (g)." But it follows from the my end and conftitution of fociety, that this natural right, as rell as many others belonging to man as an individual, may be Estrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. This restriction may heither with respect to the place in which this right may or may not be exercised; with respect to the animals that are he subject of this right; or with respect to the persons allowd or forbidden to exercise it. And, in consequence of this mthority, we find that the municipal laws of many nations ave exerted fuch power of restraint: have in general forbiden the entering on another man's grounds, for any cause, without the owner's leave; have extended-their protection to hich particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such mimals in the fovereign of the state only, and such as he shall athorize (h). Many reasons have concurred for making hele constitutions: as, 1. For the encouragement of agriculwe and improvement of lands, by giving every man an exclufive

⁽i) rag. 38, 39. (g) Inft. 2. 1. 12. (h) Puff. L. N. 1. 4.

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clusive dominion over his own foil. 2. For preservation of the feveral species of these animals, which would soon be extirpated by a general liberty. 3. For prevention of idleness and diffipation in hulbandmen, artificers, and others of low rank; which would be the unavoidable consequence of universal licence. 4. For prevention of popular insurrections and refiftance to the government, by difarming the bulk of the people (i): which last is a reason oftener meant than avowed by the makers of forest or game laws. Nor, certainly, in these prohibitions is there any natural injustice, as some have weakly enough supposed: fince, as Puffendorf observes, the law does not hereby take from any man his present property or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy which indeed the law of nature would allow him, but of which the laws of fociety have in most instances very justly and reasonably deprived him.

YET, however defensible these provisions in general may be on the footing of reason, or justice, or civil policy, we must notwithstanding acknowlege that, in their present shape, they owe their immediate original to flavery. It is not till after the irruption of the northern nations into the Roman empire that we read of any other prohibitions, than that natural one onque of not sporting on any private grounds without the owner' leave; and another of a more spiritual nature, which was rather a rule of ecclefiaftical discipline, than a breach of municipal law. The Roman or civil law, though it knew no aquifit restriction as to persons or animals, so far regarded the article and all of place, that it allowed no man to hunt or sport upon ano ther's ground, but by confent of the owner of the foil " Qui alienum fundum ingreditur, venandi aut aucupandigra " tia, potest a domino prohiberi ingrediatur (k)." For if then can, by the law of nature, be any inchoate imperfect propert fupposed in wild animals before they are taken, it feems mod reasonable to fix it in him upon whose land they are found And as to the other restriction, which relates to persons and not

⁽i) Warburton's alliance. 324.

⁽k) Inft. 2. 1. §. 12.

pplace, the pontifical or canon law (1) interdicts "venationes, "et sylvaticas vagationes cum canibus, et accipitribus" to all dergymen without distinction; grounded on a saying of St. prom (m), that it never is recorded that these diversions were used by the saints, or primitive fathers. And the camons of our Saxon church, published in the reign of king Edgar (n), concur in the same prohibition: though our semiar laws, at least after the conquest, did even in the times of popery dispense with this canonical impediment; and shritual persons were allowed by the common law to hunt for their recreation, in order to render them sitter for the personnance of their duty: as a confirmation whereof we may observe, that it is to this day a branch of the king's perogative, at the death of every bishop, to have his kentel of hounds, or a composition in lieu thereof (0).

But, with regard to the rife and original of our present will prohibitions, it will be found that all forest and game laws were introduced into Europe at the same time, and by he same policy, as gave birth to the feodal system; when tole swarms of barbarians issued from their northern hive. and laid the foundation of most of the present kingdoms of surope, on the ruins of the western empire. For when a onquering general came to settle the occonomy of a vanmihed country, and to part it out among his foldiers or indatories, who were to render him military service for ich donations; it behoved him, in order to secure his new quisitions, to keep the russici or natives of the country, ad all who were not his military tenants, in as low a contion as possible, and especially to prohibit them the use of ms. Nothing could do this more effectually than a prohition of hunting and sporting: and therefore it was the blicy of the conqueror to referve this right to himself, and whon whom he should bestow it; which were only his pital feudatories, or greater barons. And accordingly we id, in the feudal constitutions (p), one and the same law prohibiting

⁽h) Decretal, l. 5. tit. 24. c. 2. (m) Decret. part. 1. dift. 34. (n) cap. 64. (o) 4 Inst. 309. (p) Feud, l. 2. tit. 27.

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prohibiting the ruftici in general from carrying arms, and also proscribing the use of nets, snares, or other engines for destroying the game. This exclusive privilege well suited the martial genius of the conquering troops, who delighted in a fport (q) which in its pursuit and slaughter bore some resemblance to war. Vita omnis, (fays Cæsar, speaking of the antient Germans) in venationibus atque in studiis re militaris confistit (r). And Tacitus in like manner observes, that quotiens bella not ineunt, multum venatibus, plus per otium transigunt (s). And indeed, like some of their modern suc ceffors, they had no other amusement to entertain their vacant hours; they despising all arts as effeminate, and having no other learning, than was couched in fuch rude ditties as were fung at the folemn caroufals which fucceeded thef antient huntings. And it is remarkable that, in those na tions where the feodal policy remains the most uncorrupted the forest or game laws continue in their highest rigor. In France all game is properly the kings; and in some parts of Germany it is death for a peafant to be found hunting in the woods of the nobility (t). .

WITH us in England also, hunting has ever been esteemed a most princely diversion and exercise. The whole island was replenished with all forts of game in the times of the Britons who lived in a wild and pastoral manner, without inclosing or improving their grounds, and derived much of their subsistence from the chace, which they all enjoyed in common. But when husbandry took place under the Saxon government and lands began to be cultivated, improved, and enclosed the beasts naturally sled into the woody and defart tracts which were called the forests, and, having never been dispose of in the first distribution of lands, were therefore held to be long to the crown. These were filled with great plenty of game

⁽q) In the laws of Jenghiz Khan, founder of the Mogul and Tatarian empire; published A. D. 1205, there is one which prohibit the killing of all game from March to October; that the court and soldiery might find plenty enough in the winter, during their receif from war. (Mod. Univ. Hist. iv. 468). (r) De bell. Gall. 1. 6. 6. 20. (s) c. 15. (t) Mattheus de Crimin. c. 3. tit. 1. Carpzon. Practic. Saxonic, p. 2. c. 84.

game, which our royal sportsmen reserved for their own dinerson, on pain of a pecuniary forfeiture for such as intersered with their sovereign. But every freeholder had the full
sherty of sporting upon his own territories, provided he abtained from the king's forests: as is fully expressed in the
saws of Canute (v), and of Edward the confessor (u); "fit
"quilibet homo dignus venatione sua, in sylva, et in agris, sibi
"propriis, et in dominio suo: et abstineat omnis homo a vena"riis regis, ubicunque pacem eis habere voluerit:" which inseed was the antient law of the Scandinavian continent, from
whence Canute probably derived it. "Cuique enim in proprio
"fundo quamlibet feram quoquo modo venari permissum (w)."

However, upon the Norman conquest, a new doctrine took place; and the right of pursuing and taking all beafts of chase or wenary, and such other animals as were accounted name, was then held to belong to the king, or to fuch only s were authorized under him. And this, as well upon the minciples of the feodal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all eld of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the universal soil, to mter thereon, and to chase and take such creatures at his heafure: as also upon another maxim of the common law. which we have frequently cited and illustrated, that these mimals are bona vacantia, and, having no other owner, being to the king by his prerogative. As therefore the forner reason was held to vest in the king a right to pursue and the them any where; the latter was supposed to give the ing, and fuch as he should authorize, a fole and exclusive ight.

This right, thus newly vested in the crown, was exerted with the utmost rigor, at and after the time of the Norman establishment: not only in the antient forests, but in the new ones which the conqueror made, by laying together vast tracts of country,

(v) c. 77. (u) c. 36. (w) Stiernhook de jure Sueon. l. 2. c. 8.

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country, depopulated for that purpose, and reserved solely fo the king's royal diversion; in which were exercised the most horrid tyrannies and oppressions, under colour of forest law for the fake of preserving the beasts of chase; to kill any o which, within the limits of the forest, was as penal as the death of a man. And, in pursuance of the same principle king John laid a total interdict upon the winged as well as th fourfooted creation : " capturam avium per totam Anglian " interdixit (x)." The cruel and insupportable hardships which these forest laws created to the subject, occasioned ou ancestors to be as zealous for their reformation, as for there laxation of the feodal rigors and the other exactions introduce by the Norman family; and accordingly we find the immuni ties of carta de foresta as warmly contended for, and extorte from the king with as much difficulty, as those of magnacart By this charter, confirmed in parliament (y), many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of fuch as remained; particularly (z) killing the king's deer was made no longer a capital offence, but only punished by fine, impri fonment, or abjuration of the realm. And by a variety fubsequent statutes, together with the long acquiescence of the crown without exerting the forest laws, this prerogative is now become no longer a grievance to the subject.

But, as the king reserved to himself the forests for his own exclusive diversion, so he granted out from time to time other tracts of lands to his subjects under the names of chase or parks (a); or gave them licence to make such in their own grounds; which indeed are smaller forests, in the hands of a subject, but not governed by the forest laws: and by the common law no person is at liberty to take or kill any beasts of chase, but such as hath an antient chase or park; unless they be also beasts of prey.

⁽x) M. Paris 303. (y) 9 Hen. III. (z) cap. 10. (a) See pag. 38.

As to all inferior species of game, called beafts and fowls warren, the liberty of taking or killing them is another fanchise or royalty, derived likewise from the crown, and alled free warren; a word, which fignifies preservation or affody: as the exclusive liberty of taking and killing fish in public stream or river is called a free fishery; of which howner no new franchise can at present be granted, by the exness provision of magna carta, c. 16 (b). The principal ination of granting a man these franchises or liberties was in ner to protect the game, by giving him a fole and exclusive ower of killing it himself, provided he prevented other persons. and no man, but he who has a chase or free warren, by grant on the crown, or prescription which supposes one, can jusly hunting or sporting upon another man's soil; nor indeed, thorough strictness of common law, either hunting or porting at all.

However novel this doctrine may feem, it is a regular mequence from what has been before delivered; that the fole th of taking or destroying game belongs exclusively to the ing. This appears, as well from the historical deduction me made, as because he may grant to his subjects an excluright of taking them; which he could not do, unless such ight was first inherent in himself. And hence it will folm, that no person whatever, but he who has such derivative the from the crown, is by common law entitled to take or any beafts of chase, or other game whatsoever. It is true, at by the acquiescence of the crown, the frequent grants of warren in antient times, and the introduction of new pethes of late by certain statutes for preserving the game, this thulive prerogative of the king is little known or confidered; my man that is exempted from these modern penalties, wking upon himself as at liberty to do what he pleases with agame; whereas the contrary is strictly true, that no man, wever well qualified he may vulgarly be esteemed, has a right

⁽b) Mirr. c 5. §. 2. See pag. 39.

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right to encroach on the royal prerogative by the killing game, unless he can shew a particular grant of free warren or a prefcription, which prefumes a grant; or some authorit under an act of parliament. As for the latter, I know bu of two instances wherein an express permission to kill gam was ever given by statute; the one by I Jac. I. c. 27. altere by 7 Jac. I. c. 11. and virtually repealed by 22 & 23 Car. II. 25. which give authority, fo long as they remained in force to the owners of free warren, to lords of manors, and to all free holders having 401. per annum in lands of inheritance, or 80 for life or lives, or 400l. personal estate, (and their servants to take partridges and pheasants upon their own, or the master's free warren, inheritance or freehold: the other h 5 Ann. c. 14. which empowers lords and ladies of manors appoint gamekeepers to kill game for the use of such lord lady; which with some alterations still subsists, and plain supposes such power not to have been in them before. The truth of the matter is, that these game laws (of which w shall have occasion to speak again in the fourth book of the commentaries) do indeed qualify nobody, except in the i stance of a game-keeper, to kill game: but only, to fave t trouble and formal process of an action by the person injure who perhaps too might remit the offence, thefe statutes infli additional penalties, to be recovered either in a regular fummary way, by any of the king's subjects, from certa persons of inferior rank who may be found offending in the particular. But it does not follow that persons, excus from these additional penalties, are therefore authorized The circumstances of having 100l. per annua and the rest, are not properly qualifications, but exemp And these persons, so exempted from the penalties the game statutes, are not only liable to actions of trespa by the owners of the land; but also, if they kill game with the limits of any royal franchise, they are liable to the a tions of fuch who may have the right of chase or free warren therein.

UPON

UPON the whole it appears, that the king, by his prerogaire, and fuch perfons as have, under his authority, the royal fanchises of chace, park, free warren, or free fishery, are the my persons, who may acquire any property, however fugime and transitory, in these animals ferae naturae, while wing; which is faid to be vested in them, as was observed a former chapter, propter privilegium. And it must also remembered, that fuch persons as may thus lawfully hunt, in, or fowl, ratione privilegii, have (as has been faid) only qualified property in these animals: it not being absolute or manent, but lasting only so long as the creatures remain whin the limits of fuch respective franchise or liberty, and ming the instant they voluntarily pass out of it. It is held ideed, that if a man starts any game within his own grounds, ad follows it into another's, and kills it there, the property mains in himself (c). And this is grounded on reason and utural justice (d): for the property consists in the possession; which possession commences by the finding it in his own liber-, and is continued by the immediate pursuit. And so, if a anger starts game in one man's chase or free warren, and unts it into another liberty, the property continues in the mer of the chase or warren: this property arising from prilege (e), and not being changed by the act of a mere stran-. Or if a man starts game on another's private grounds wikills it there, the property belongs to him in whose ground twas killed, because it was also started there (f); this promty arising ratione foli. Whereas if, after being started there, is killed in the grounds of a third person, the property beings not to the owner of the first ground, because the proaty is local; nor yet to the owner of the fecond, because it not started in his foil; but it vests in the person who arted and killed it (g), though guilty of a trespass against with the owners.

III. I PRO-

⁽c) 11 Mod. 75. (d) Puff. L. N. l. 4. c. 6. (e) Lord lym. 251. (f) Ibid. (g) Farr. 18. Lord Raym. ibid.

III. I PROCEED now to a third method, whereby a title to goods and chattels may be acquired and loft, viz. by forfeiture; as a punishment for some crime or misdemesnor in the party forseiting, and as a compensation for the offence and injury committed against him to whom they are forseited. Of sorfeitures, considered as the means whereby real property might be lost and acquired, we treated in a former chapter (h). It remains therefore in this place only to mention, by wha means or for what offences goods and chattels become liable to forseiture.

In the variety of penal laws with which the fubject is a present incumbered, it were a tedious and impracticable talk to reckon up the various forfeitures, inflicted by special statutes, for particular crimes and misdemesnors: some of which are mala in fe, or offences against the divine law, either na tural or revealed; but by far the greatest part are mala probi bita, or such as derive their guilt merely from their prohibi tion by the laws of the land: fuch as is the forfeiture of 40s per month by the fratute 5 Eliz. c. 4. for exercifing a trad without having ferved feven years as an apprentice thereto and the forfeiture of 101. by 9 Ann. c. 23. for printing an al manac without a stamp. I shall therefore confine myself to those offences only, by which all the goods and chattels of the offender are forfeited: referring the student for such where pecuniary mulcts of different quantities are inflicted, to their feveral proper heads, under which very many of then have been or will be mentioned; or else to the collections of Hawkins and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the crown, they may feem as if they ought to have been referred to the preceding method of acquiring perfonal property, namely, by preroga-But as, in the instance of partial forfeitures, a moiety often goes to the informer, the poor, or fometimes to other persons; and as one total forfeiture, namely that by a bank-

(h) See pag. 267.

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npt who is guilty of felony by concealing his effects, accrues mirely to his creditors, I have therefore made it a distinct had of transferring property.

Goods and chattels then are totally forfeited by conviction high treason, or misprission of treason; of petit treason; of sieny in general, and particularly of felony de se, and of man-laughter; nay even by conviction of excusable homicide (i); by outlawry for treason or felony; by conviction of petit beceny; by flight in treason or felony, even though the party exacquitted of the fact; by standing mute, when arraigned is selony; by drawing a weapon on a judge, or striking any me in the presence of the king's courts; by praemunire; by settended prophecies, upon a second conviction; by owling; by the residing abroad of artificers; and by challenging to so that the second of these commensumes, induce a total forseiture of goods and chattels.

AND this forfeiture commences from the time of conviction, on the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to affect them, by any relation back, would be stended with more inconvenience than in the case of landed states: and part, if not the whole of them, must be expended a maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5.

⁽i) Co. Litt. 391. 2 Inft. 316. 3 Inft. 320.

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CHAPTER THE TWENTY-EI

TITLE

FOURTH method of acquiring property in thin personal, or chattels, is by custom: whereby a rig vests in some particular persons, either by the local usage fome particular place, or by the almost general and univer usage of the kingdom. It were endless, should I attempt enumerate all the feveral kinds of special customs, which m entitle a man to a chattel interest in different parts of t kingdom: I shall therefore content myself with making for observations on three forts of customary interests, which o tain pretty generally throughout most parts of the nation, a are therefore of more universal concern'; viz. heriots, mort aries, and beir-looms.

1. HERIOTS, which were flightly touched upon in a for mer chapter (a), are usually divided into two forts, heric fervice, and heriot-custom. The former are fuch as are d upon a special reservation in a grant or lease of lands, a therefore amount to little more than a mere rent (b): latter arise upon no special reservation whatsoever, but depe merely upon immemorial usage and custom (c). Of the and therefore we are here principally to speak: and they are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.

⁽c) Co. Cop. §. 24. (b) 2 Saund. 166. (a) pag. 97.

THE first establishment, if not introduction, of compulwheriots into England, was by the Danes: and we find in laws of king Canute (d) the feveral heregeates or heriots mified, which were then exacted by the king on the death divers of his subjects, according to their respective dignisfrom the highest earle down to the most inferior thegne or sholder. These, for the most part, consisted in arms, ries, and habiliments of war; which the word itself, acing to fir Henry Spelman (e), fignifies. These were deged up to the fovereign on the death of the vafal, who id no longer use them, to be put into other hands for the nice and defence of the country. And upon the plan of this mih establishment did William the Conqueror fashion his of reliefs, as was formerly observed (f); when he asmined the precise relief to be taken of every tenant in chiy, and, contrary to the feodal custom and the usage of own duchy of Normandy, required arms and implements war to be paid instead of money (g).

THE Danish compulsive heriots, being thus transmuted into lefs, underwent the same several vicissitudes as the feodal ures, and in focage estates do frequently remain to this in the shape of a double rent payable at the death of the ant: the heriots which now continue among us, and prethat name, seeming rather to be of Saxon parentage, at first to have been merely discretionary (h). These are for the most part confined to copyhold tenures, and are by custom only, which is the life of all estates by copy, perhaps are the only instance where custom has favoured ord. For this payment was originally a voluntary donaor gratuitous legacy of the tenant; perhaps in acknowment of his having been raised a degree above villenage, hall his goods and chattels were quite at the mercy of the and custom, which has on the one hand confirmed the tenant's

Canqu. c. 22, 23, 24. (h) Lambard. Peramb. of Kent. 492.

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tenant's interest in exclusion of the lord's will, has on other hand established this discretional piece of gratitude in a permanent duty. An heriot may also appertain to land, that is held by fervice and fuit of court; in which call is most commonly a copyhold enfranchised, whereupon heriot is still due by custom. Bracton (i) speaks of heri as frequently due on the death of both species of tenan " eft quidem alia praestatio quae nominatur beriettum; ubi " nens, liber vel servus, in morte sua dominum suum, de quo " nuerit, respicit de meliori averio suo, vel de secundi meli " fecundum diversam locorum consuetudinem." And this, adds, " magis fit de gratia quam de jure ;" in which Fleta and Britton (1) agree: thereby plainly intimating the origin of this custom to have been merely voluntary, as a legal from the tenant; though now the immemorial usage has ele blished it as of right in the lord.

THIS heriot is fometimes the best live beast, or averi which the tenant dies possessed of, (which is particular denominated the villein's relief in the twenty ninth law king William the Conqueror) fometimes the best inanim good, under which a jewel or piece of plate may be included but it is always a personal chattel, which, immediately on death of the tenant who was the owner of it, being ascertai by the option of the lord (m), becomes vested in him as property: and is no charge upon the lands, but merely the goods and chattels. The tenant must be the owner of else it cannot be due; and therefore on the death of a fee covert no heriot can be taken; for she can have no owner in things personal (n). In some places there is a custom composition in money, as ten or twenty shillings in lieu of heriot, by which the lord and tenant are both bound, if be an indifputably antient custom: but a new composition this fort will not bind the representatives of either party: that amounts to the creation of a new custom, which is no impossible (o). 2. Mon

⁽i) l. 2. c. 36. § 9. (k) l. 3. c. 18. (1) c. 69. (m) Ho 60. (n) Keilw. 84. 4 Leon. 239. (o) Co. Cop. §. 31.

MORTUARIES are a fort of ecclefiaftical heriots, being a oftomary gift claimed by and due to the minister in very many parishes on the death of his parishioners. They feem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended, as Lyndewode informs us from a constitution of archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes, and other ecclefiastical duties, which the laity in their lifeime might have neglected or forgotten to pay. For this purpole, after (p) the lord's heriot or best good was taken out. the second best chattel was reserved to the church as a morwary: " si decedens plura babuerit animalia, optimo cui de "jure fuerit debitum refervato, ecclesia sua sine dolo, frande, "seu contradictione qualibet, pro recompensatione substractionis "decimarum personalium, necnon et oblationum, secundum me-"lius animal reservetur, post obitum, pro salute anima sua "(q)." And therefore in the laws of king Canute (r) this mortuary is called foul-fcot (raphreat) or symbolum anima. And, in pursuance of the same principle, by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death out of his merchandize, jewels, and other moveables (s). So also, by a imilar policy, in France, every man that died without bequeathing a part of his estate to the church, which was alled dying without confession, was formerly deprived of christian burial: or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church, in ase he had made a will. But the parliament, in 1409, redressed this grievance (t).

It was antiently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried; and thence (u) it is sometimes called a corse-present: a term, Vol. II.

⁽p) Co. Litt. 185. (q) Provinc. l. 1. tit. 3. (r) c. 13. (s) Panormitan. ad Decretal. l. 3. t. 20. c. 32. (t) Sp. L. b. 28. c. 41. (u) Selden. hift. of tithes. c. 10.

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which bespeaks it to have been once a voluntary donation. However in Bracton's time, fo early as Henry III, we find i rivetted into an established custom: infomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. " Imprimis autem debet quili-66 bet, qui testamentum fecerit, dominum suum de meliori re es quam habuerit recognoscere; et postea ecclesiam de tilia me-" liori:" the lord must have the best good left him as an heriot; and the church the second best as a mortuary. But yet this custom was different in different places: " in quibus a dam locis babet ecclesia melius animal de consuetudine; in " quibusdam secundum, vel tertium melius; et in quibusdam " nihil: et ideo confiderando est consuetuda loci (w)." This custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales, a mortuary or corfe-present was due upon the death of every clergyman to the bishop of the diocese; till abolished, upon a recompense given to the bishop, by the statute 12 Ann. ft. 2. c. 6. And in the archdeaconry of Chefter a custom also prevailed, that the bishop, who is also archdeacon, should have at the death of every clergyman dying therein, his best horse ormare, bridle, faddle, and fpurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best fignet or ring (x). But by statute 28 Geo. II. c. 6. this mortuary is directed to cease, and the act has settled upon the bishop an equivalent in its room. The king's claim to many goods, on the death of all prelates in England, feems to be of the fame nature; though fir Edward Coke (y) apprehends, that this is a duty due upon death and not a martuary: a diftinction which feems to be without a difference. For not only the king's ecclefiaftical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowleged mortuary, puts the matter out of dispute. The king, according to the record vouched by fir Edward Coke, is entitled to fix things; the bishop's best horse or palfrey,

⁽w) Bracton. 1. 2. c. 26. Flet. 1 2. c 57. (x) Cro. Car. 237. (y) 2 Init. 491.

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frey, with his furniture: his cloak, or gown, and tippet: his cup, and cover: his bason, and ewer: his gold ring: and, lastly, his muta canum, his mew or kennel of hounds; as was mentioned in the preceding chapter (z).

THIS variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one fide, and frauds or expensive litigations on the other; it was thought proper by fatute 21 Hen. VIII. c. 6. to reduce them to some kind of certainty. For this purpose it is enacted, that all mortuaries. or corfe-presents to parsons of any parish, shall be taken in the following manner; unless where by custom less or none stall is due: viz. for every person who does not leave goods to the value of ten marks, nothing: for every person who leaves goods to the value of ten marks, and under thirty pounds, v. 4d. if above thirty pounds, and under forty pounds, 6s. Id. if above forty pounds, of what value foever they may be, 101. and no more. And no mortuary shall throughout the kingdom be paid for the death of any feme-covert; nor for my child; nor for any one of full age, that is not a housekeeper; nor for any wayfaring man; but fuch wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.

3. Heir-looms are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination, loom, is of Saxon original; in which language it signifies a limb or member (a); to that an heir loom is nothing else, but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold; where sie the general rule is, that no chattel interest what so the sie the general rule is, that no chattel interest what so the sie in a man and his heirs, but shall vest in the executor (b). But deer in a real authorized park, sishes in a pond, doves in a dove-

⁽²⁾ pag. 413. (a) Spel.n. Gloff. 277. (b) Co. Litt. 368.

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a dove-house, &c. though in themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase (c). For this reasonalso I apprehend it is, that the antient jewels of the crown are held to be heir-looms (d): for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. Charters likewise, and deeds, court-rolls, and other evidences of the land, together with the chefts in which the are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor (e). By special custom also, in some places, carriages, utenfils, and other household implements may be heir-looms (f); but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freeholdor inheritance, and cannot be severed from thence without violence or damage, " quod ab adibus non facile revellitur (g), is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old fixed or dor mant tables, benches, and the like (h). A very similar notion to which prevails in the duchy of Brabant; where they rank certain things moveable among those of the immoveable kind. calling them, by a very peculiar appellation, pradia volantia, or volatile estates: such as beds, tables, and other heavy implements of furniture, which (as an author of their own observes) " dignitatem istam nocta sunt, ut villis, sylvis, et adibus, « aliifque prædiis, comparentur; quod folidiora mobilia ipu « adibus ex destinatione patris familias coharere videantur, " et pro parte ipsarum ædium æstimentur (i)."

OTHER personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, or the coat-armor of his ancestor there hung

⁽c) Co. Litt. 8. (d) Ibid. 18. (e) Bro. Abr. tit chatteles.

18. (f) Co. Litt. 18. 185. (g) Spelm. Gloff. 277. (h)

12 Mod. 520. (i) Stockmans de jure devolutionis. c. 3. §. 16.

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up, with the pennons and other enfigns of honor, fuited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir (k). Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclefiastical concurrence) from the ancestor to the heir (1). But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any avil action against such as indecently at least, if not impiously, riolate and diffurb their remains, when dead and buried. The parson indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it: and, if any one in taking up a dead body steals the shroud or other apparel, it will be felony (m); for the property thereof remains in the executor, or whoever was at the charge of the funeral.

But to return to heir-looms: these, though they be mere chattels, yet cannot be devised away from the heir by will; but such a devise is void (n), even by a tenant in fee-simple. For, though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet, they being at his death instantly rested in the heir, the devise (which is subsequent, and not to take effect till after his death) shall be postponed to the custom, whereby they have already descended.

⁽k) 12 Rep. 105. Co. Litt. 18. (l) 3 Inst. 202. 12 Rep. 105. (m) 3 Inst. 110. 12 Rep. 113. 1 Hal. P. C. 515. (n) Co. Litt. 185.

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CHAPTER THE TWENTY NINTH.

OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

I N the present chapter we shall take into consideration three other species of title to goods and chattels.

V. THE fifth method therefore of gaining a property in chattels, either personal or real, is by fuccession: which is, in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one fet of men may, by fucceeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies; and therefore the predecessors, who lived a century ago, and their fuccessors now in being, are one and the same body corporate (a). Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in fuccession by such a body, that succesfion need not be expressed; but the law will of itself imply it. So that a gift to fuch a corporation, either of lands or of chattels, without naming their fucceffors, vefts an absolute property in them fo long as the corporation subsists (b). And thus a leafe for years, an obligation, a jewel, a flock of sheep,

⁽a) 4 Rep. 65. (b) Bro. Abr. t. estates. 90. Cro. Eliz. 464.

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or other chattel interest, will vest in the successors, by succesfion, as well as in the identical members, to whom it was originally given. The agreem a and a (a) asome

But, with regard to fole corporations, a confiderable difinction must be made. For if such sole corporation be the representative of a number of persons; as the master of an hosnital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent; or the dean of some antent cathedral, who stands in the place of, and represents in his corporate capacity, the chapter; fuch fole corporations sthese have in this respect the same powers, as corporations aggregate have, to take personal property or chattels in sucreffion. And therefore a bond to fuch a master, abbot, or dean, and his successors, is good in law; and the successor hall have the advantage of it, for the benefit of the aggregate fociety, of which he is in law the representative (c). Whereas in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no mattel interest can regularly go in succession : and therefore, fa lease for years be made to the bishop of Oxford and his accessors, in such case his executors or administrators, and not his fuccessors, shall have it (d). For the word successors, when applied to a person in his politic capacity, is equivalent the word heirs in his natural: and as fuch a leafe for years, made to John and his heirs, would not vest in his heirs, but is executors; fo, if it be made to John bishop of Oxford and his fuccessors, who are the heirs of his body politic, it shall west in his executors and not in such his successors. The rasion of this is obvious: for, besides that the law looks yon goods and chattels as of too low and perishable a nawe to be limited either to heirs, or fuch successors as are quivalent to heirs; it would also follow, that if any such tattel interest (granted to a sole corporation and his successwere allowed to descend to such successor, the property hereof must be in abeyance from the death of the present owner T 4

(c) Dyer. 48. Cro. Eliz. 464. (d) Co. Litt. 46

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until the fuccessor be appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner (e); but a man's right therein, when once suspended, is gone for ever. This is not the case in corporations aggregate, where the right is never in suspence; nor in the other sole corporations before-mentioned, who are rather to be considered as heads of an aggregate body, than substituting merely in their own right; the chattel interest therefore, in such a case, is really and substantially vested in the hospital, convent, chapter, or other aggregate body; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go or be acquired by right of succession (f).

YET to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of formerly made to a preceding king and his fuccesfors (g). The other exception is, where, by a particular custom, some parts cular corporations sole have acquired a power of taking partcular chattel interests in succession. And this custom, being against the general tenor of the common law, must be strict interpreted, and not extended to any other chattel interests than fuch immemorial usage will strictly warrant. Thus the chamberlain of London, who is a corporation fole, may by the custom of London take bonds and recognizances to hims and his fuccessors, for the benefit of the orphans' fund (h) but it will not follow from thence, that he has a capacity to take a lease for years to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a bond to himself and his successors, for any other purpose than the benefit of the orphans' fund; for that also is not warranted by the custom. Wherefore, upon the whole, may close this head with laying down this general rule; the fuch right of fuccession to chattels is universally inheren

⁽e) Brownl. 132. (f) Co. Litt. 45. (g) Ibid. 90. (h) 4 Rep. 65. Cro. Eliz. 682.

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may poli by the common law in all aggregate corporations, in the king, and in such single corporations as represent a number of perfons; and may, by special custom, belong to certain other sole corporations for some particular purposes: although, generally, in sole corporations no such right can exist.

VI. A SIXTH method of acquiring property in goods and chattels is by marriage; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property, and with the same powers, as the wife, when sole, had over them.

THIS depends entirely on the notion of an unity of person between the husband and the wife; it being held that they are one person in law (i), so that the very being and existence of the woman is suspended during the coverture, or entirely merged and incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon feodal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless by the birth of a child, he becomes tenant for life by the curtefy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chuses to take possession of them: for, unless he reduces them to posfession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined.

THERE is therefore a very confiderable difference in the acquisition of this species of property by the husband, according to the subject matter; viz. whether it be a chattel real,

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(i) See book I. c. 15.

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or a chattel personal; and, of chattels personal, whether it be in possession, or in action only. A chattel real vests in the husband, not absolutely, but sub modo. As, in case of a lease for years; the husband shall receive all the rents and profits of it, and may, if he pleases, sell, furrender, or dispose of it during the coverture (k): if he be outlawed or attainted, it shall be forfeited to the king (1): it is liable to execution for his debts (m): and, if he furvives his wife, it is to all intents and purposes his own (n). Yet if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will (o): for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her antient possession, and it shall not go to his executors, So it is also of chattels personal (or choses) in action; as debts upon bond, contracts, and the like: thefe the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And, upon such receipt or recovery, they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But, if he dies before he has recovered or reduced them into posfession, so that at his death they still continue choses in action, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them (p). And so, if an estray comes into the wife's franchife, and the husband seises it, it is absolutely his property: but, if he dies without feifing it, his executors are not now at liberty to feife it, but the wife or her heirs (q); for the hufband never exerted the right he had, which right determined with the coverture. Thus in both these species of property the law is the same, in case the wife survives the husband; but, in case the husband survives the wife, the law is very different with respect to chattels real and choses in action: for he shall

⁽k) Co. Litt. 46. (l) Plowd. 263. (m) Co. Litt. 351. (n) Ibid. 300. (o) Poph. 5. Co. Litt. 351. (p) Co. Litt. 351. (q) Ibid.

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have the chattel real by furvivorship, but not the chose in action (r); except in the case of arrears of rent, due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. And the reason for the general law is this: that the husband is in absolute possession of the chattel real during the coverture, by a kind of joint-tenancy with his wife: wherefore the law will not wrest it out of his hands, and give it to her representatives: though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a chose in action shall not survive to him, because he never was in possession of it at all, during the coverture; and the only method he had to gain possession of it, was by fuing in his wife's right: but as, after her death, he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as fuch) recover the possession. But he still will be entitled to be her administrator; and may, in that capacity, recover fuch things in action as became due to her before or during the coverture.

THUS, and upon these reasons, stands the law between husband and wife, with regard to chattels real, and choses in action: but, as to chattels personal (or choses) in possession, which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially but in fact, which never can again revest in the wife or her representative (s).

AND, as the husband may thus, generally, acquire a property in all the personal substance of the wise, so in one particular instance the wise may acquire a property in some of her lusband's goods; which shall remain to her after his death, and shall not go to his executors. These are called her paraphernalia:

⁽r) 3 Mod. 186.

⁽s) Co. Litt. 351.

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phernalia; which is a term borrowed from the civil law (t) and is derived from the Greek language, fignifying fomething over and above her dower. Our law uses it to fignify the apparel and ornaments of the wife, fuitable to her rank and degree; which she becomes entitled to at the death of he husband, over and above her jointure or dower, and preferably to all other representatives (u): and the jewels of a peeres usually worn by her, have been held to be paraphernalia (w) Neither can the husband devise by his will fuch ornaments and iewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to fell them of give them away (x). But if the continues in the use of them tillhis death, the shall afterwards retain them against his executors and administrators, and all other persons, except creditors where there is a deficiency of affets (y). And her ne ceffary apparel is protected even against the claim of credi tors (z).

VII. A JUDGMENT, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party And here we must be careful to distinguish between property the right of which is before vested in the party, and of which only possession is recovered by suit or action; and property, to which a man before had no determinate title or certain claim. but he gains as well the right as the possession by the process and judgment of the law. Of the former fort are all debt and choses in action; as if a man gives bond for 201. or agree to buy a horse at a stated sum, or takes up goods of a trademan upon an implied contract to pay as much as they are reafonably worth; in all these cases the right accrues to the creditor, and is completely vested in him, at the time of the bond being fealed, or the contract or agreement made; and the law only gives him a remedy to recover the possession

⁽t) Ff. 23. 3. 9. §. 3. (u) Cro. Car. 343. 1 Roll. Abr. 911. (a) 2 2 Leon. 186. (w) Moor. 213. (x) Noy's Max. c. 49. (l) Rep Grahme's Lord Londonderry 24 Nov. 1746. Canc. (y) 1. P. 11 Rep Wms. 730. (2) Noy's Max. c. 49.

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possession of that right, which already in justice belongs to him. But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time: and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. SUCH penalties as are given by particular statutes, to be recovered on an action popular; or, in other words, to be recovered by him or them that will fue for the same. Such as the penalty of 500 l. which those persons are by several acts of parliament made liable to forfeit, that, being in particular offices or fituations in life, neglect to take the oaths. to the government; which penalty is given to him or them that will fue for the same. Now here it is clear that no particular person, A or B, has any right, claim, or demand. in or upon this penal fum, till after action brought (a); for he that brings his action, and can bona fide obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body elfe. He obtains an inchoate imperfect degree of property, by commencing his fuit: but it is not confummated till judgment; for, if any collusion appears, he lofes the priority he had gained (b). But, otherwise, the right fo attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after fuit commenced remit any thing but his own part of the penalty (c). For by commencing the fuit the informer has made the popular action his own private action; and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore is one instance, where a fuit and judgment at law are not only

^{91. (}a) 2 Lev. 141. Stra. 1169. Combe v. Pitt. B. R. Tr. 3 Geo.

(b) Stat. 4 Hen. VII. c. 20. (c) Cro. Eliz. 138.

11 Rep. 65.

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only the means of recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed as it were in a state of nature, accessible by all the king's subjects, but the acquire d right of one of them; open therefore to the first occupant, who declares his intention to possess them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them.

2. ANOTHER species of property, that is acquired and los by fuit and judgment at law, is that of damages given to man by a jury, as a compensation and fatisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has affeffed his damages. and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires. and the defendant loses at the same time, a right to that specific fum. It is true, that this is not an acquifition fo perfeetly original as in the former instance: for here the injured party has unquestionably a vague and determinate right to fome damages or other the instant he receives the injury and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a new title in him, as fix and afcertain the old one; they do not give, but define, the right. But however, though strictly speaking the primary right to a fatisfaction for injuries is given by the law of nature, and the fuit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only vifible means of this acquifition of property, we may fairly enough rank fuch damages, or fatisfaction affeffed, under the head of property acquired by fuit and judgment at law. me bei and is a read when the lampbuj

BHTHE . T. M. . Mer. 1169. Contest F. R. B. T. a. C.

3. HITHER also may be referred, upon the same principle, little to costs and expenses of suit; which are often arbitry, and rest entirely in the determination of the court, upon eighing all circumstances, both as to the quantum, and also in the courts of equity especially, and upon motions in the purts of law) whether there shall be any costs at all. These afts therefore, when given by the court to either party, may a looked upon as an acquisition made by the judgment of the same statement.

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OF TITLE BY GIFT, GRANT, AND CONTRACT.

WE are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by gift or grant, and by contract: whereof the former vests a property in possession, the latter a property in action.

VIII. GIFTS then, or grants, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that gifts are always gratuitous, grants are upon fome confideration or equivalent : and they may be devided, with regard to the subject-matter, into giftts or grants of chattels real, and gifts or grants of chattels personal. Under the head of gifts or grants of chattels real may be included leases for years of land, affignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were confidered in the twentieth chapte of the present book, and therefore need not be here again to peated: though these very seldom carry the outward appear ance of a gift, however freely bestowed; being usually preffed to be made in confideration of blood, or natural fection, or of five or ten shillings nominally paid to the grant or; and, in case of leases, always reserving a rent, thoughin but a peppercorn; any of which considerations will, in the of the law, convert the gift, if executed, into a grant : if no executed, into a contract.

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GRANTS or gifts, of chattels personal, are the act of transferring the right and the poffethon of them; whereby one man renounces, and another man immediately acquires, all title and interest therein: which may be done either in writing, or by word of mouth (a) attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors or others become fufferers thereby. And, particularly, by statute Hen. VII. c. 4. all deeds of gift of goods, made in trust to the use of the donor, shall be void; because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5. every gant or gift of chattels, as well as lands, with intent to defraud meditors or others (b), shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual; and all perfons partakers in, or privy to, fuch fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved : and also on conviction shall suffer imprisonment for half a year.

ATRUE and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately: as if A gives to B 100l. or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any confideration or recompense (c): unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, durefs, or the like; or if he were drawn in, dircumvented, or imposed upon, by false pretences, ebriety, or furprize. But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract: and this a man cannot be compelled to perform,

(2) Perk. §. 57.

(b) See 3 Rep. 82.

(c) Jenk. 109.

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but upon good and fufficient confideration; as we shall fee under our next division. GRANTS OF WHICH OF CHARLES

IX. A CONTRACT, which usually conveys an interest merely in action, is thus defined : " an agreement, upon fuf ficient confideration, to do or not to do a particular thing. From which definition there arise three points to be contemplated in all contracts; 1. The agreement: 2. The confidera tion: and 3. The thing to be done or omitted, or the different species of contracts.

FIRST then it is an agreement, a mutual bargain or convention; and therefore there must at least be two contracting par ties of sufficient ability to make a contract; as where A contracts with B to pay him 100/. and thereby transfers a property in fuch fum to B. Which property is however not in posses fion, but in action merely, and recoverable by fuit at law wherefore it could not be transferred to another person by the strict rules of the antient common law : for no chose in action could be affigned or granted over (d), because it was though to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law But this nicety is now difregarded: though, in compliance with the antient principle, the form of affigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the affignee to make use of the name of the affignor, in order to recover the possession. And therefore when in common acceptation a debt or bond is faid to be affigned over, it must still be sued in the original creditor' name; the person, to whom it is transferred, being rather an attorney than an affignee. But the king is an exception to this general rule; for he might always either grant or receive chose in action by affignment (e): and our courts of equity confidering that in a commercial country almost all persona property must necessarily lie in contract, will protect the as fignment of a chose in action, as much as the law will that o a chose in possession (f).

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⁽e) Dyer 30. Bro. Abr. tit. chose in (d) Co. Litt. 214. (f) 3 P. Wms. 199. ection. 1 & 4.

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THIS contract or agreement may be either express or imjed. Express contracts are where the terms of the agreeent are openly uttered and avowed at the time of the making, sto deliver an ox, or ten loads of timber, or to pay a stated nce for certain goods. Implied are fuch as reason and justice Mate, and which therefore the law prefumes that every man ndertakes to perform. As, if I employ a person to do any finess for me, or perform any work; the law implies that I dertook, or contracted, to pay him as much as his labour serves. If I take up wares from a tradesman, without any geement of price, the law concludes that I contracted to pay real value. And there is also one species of implied connets, which runs through and is annexed to all other connets, conditions, and covenants; viz. that if I fail in my nt of the agreement, I shall pay the other party such damages the has fustained by such my neglect or refusal. In short alof all the rights of personal property (when not in actual ffishon) do in great measure depend upon contracts of one and or other, or at least might be reduced under some of them: hich indeed is the method taken by the civil law; it having ferred the greatest part of the duties and rights, which it tats of, to the head of obligations ex contractu and quasi ex in miractu (g).

ACONTRACT may also be either executed, as if A agrees to ange horses with B, and they do it immediately; in which the poffession and the right are transferred together: or it by be executory, as if they agree to change next week; here right only vests, and their reciprocal property in each ter's horse is not in possession but in action: for a contract exeud (which differs nothing from a grant) conveys a choje in fision; a contract executory conveys only a chose in action.

HAVING thus shewn the general nature of a contract, we fecondly, to proceed to the confideration upon which it is unded; or the reason which moves the party contracting to enter into the contract. " It is an agreement, upon sufficien confideration." The civilians hold, that in all contracts either express or implied, there must be something given i exchange, fomething that is mutual or reciprocal (h). This thing, which is the price or motive of the contract, we ca the confideration: and it must be a thing lawful in itself, o else the contract is void. A good consideration, we have be fore seen (i), is that of blood or natural affection between near relations; the fatisfaction accruing from which the law efteen an equivalent for whatever benefit may move from one relation to another (i). This confideration may fometimes however be fet aside, and the contract become void, when it tends ini consequences to defraud creditors or other third persons their just rights. But a contract for any valuable consideration as for marriage, for money, for work done, or for other red procal contracts, can never be impeached at law; and, if it of a sufficient adequate value, is never set aside in equity: s the person contracted with has then given an equivalent in compense, and is therefore as much an owner, or a credito as any other person.

These valuable confiderations are divided by the civilians (k) into four species. 1. Do, ut des: as when I gi money or goods, on a contract that I shall be repaid money goods for them again. Of this kind are all loans of mone upon bond, or promise of repayment; and all sales of good in which there is either an express contract to pay so much sthem, or else the law implies a contract to pay so much as the are worth. 2. The second species is, facio, ut facias: when I agree with a man to do his work for him, if he will mine for me: or if two persons agree to marry together; to do any other positive acts on both sides. Or, it may be forbear on one side in consideration of something done on other; as, that in consideration A, the tenant, will repair house, B, the landlord, will not sue him for waste. Or, may be for mutual forbearance on both sides; as that in consideration of something done on some some such as the sum of sideration of some same such as the sum of sideration of some same such as the sum of sideration of some same such as the sum of sideration of some same such as the sum of sideration of some same such as the sum of sideration of some same such as the sum of sum

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⁽h) In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur. Gravin. l. 2. §. 12. (i) pag. 297.

3 Rep. 83. (k) Ff. 19 5. 5.

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deration that A will not trade to Lisbon, B will not trade to Marfeilles; fo as to avoid interfering with each other. 3. The third species of considerations is facio, ut des: when a an agrees to perform any thing for a price, either specifially mentioned, or left to the determination of the law to fet value on it. And when a servant hires himself to his maser, for certain wages or an agreed fum of money: here the grant contracts to do his master's service, in order to earn hat specific sum. Otherwise, if he be hired generally; for en he is under an implied contract to perform this service what it shall be reasonably worth. 4. The fourth species do ut facias; which is the direct counterpart of the other. swhen I agree with a fervant to give him fuch wages upon sperforming fuch work: which, we fee, is nothing else but he last species inverted; for servus facit, ut berus det, and frus dat, ut servus faciat.

ACONSIDERATION of some fort or other is so absolutely neessay to the forming of a contract, that nudum pactum or greement to do or pay any thing on one fide, without any ampensation on the other, is totally void in law; and a man annot be compelled to perform it (1). As if one man promises by give another 100l. here there is nothing contracted for or wen on the one fide, and therefore there is nothing binding of the other. And, however a man may or may not be bound he perform it, in honor or conscience, which the municipal the aws do not take upon them to decide; certainly those munifible inducement to engage for: and therefore our law has lopted (m) the maxim of the civil law (n), that ex mido be allo non oritur actio. But any degree of reciprocity will on the revent the pact from being nude: nay, even if the thing be unded on a prior moral obligation, (as a promise to pay a Adebt, though barred by the statute of limitations) it is no nger nudum pactum. And as this rule was principally efta-Whed, to avoid the inconvenience that would arise from setagup mere verbal promises, for which no good reason could

⁽m) Bro. Abr. tit. dette. 79. Salk. (1) Dr. & St. d. 2. c. 24. (n) Cod. 2. 3. 10. 8 5. 14. 1.

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be assigned (0), it therefore does not hold in some cases, whe such promise is authentically proved by written document. For if a man enters into a voluntary bond, or gives a promisory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solution of the instrument (p), and every note from the subscription of the drawer (q), carries with it an internal evaluation of a good consideration. Courts of justice will then fore support them both, as against the contractor himself; be not to the prejudice of creditors, or strangers to the contractor

WE are next to consider, thirdly, the thing agreed to done or omitted." "A contract is an agreement, upon su "ficient consideration, to do or not to do a particular thing. The most usual contracts, whereby the right of chattels perfonal may be acquired in the laws of England, are, 1. The of fale or exchange. 2. That of bailment. 3. That of his ing and borrowing. 4. That of debt.

1. SALE or exchange is a transmutation of property from one man to another, in confideration of some price or recompense value: for there is no fale without a recompense; there m be quid pro quo (r). If it be a commutation of goods for good it is more properly an exchange; but, if it be a transferring goods for money, it is called a fale: which is a method of e change introduced for the convenience of mankind, by eff blishing an universal medium, which may be exchanged for forts of other property; whereas if goods were only to exchanged for goods, by way of barter, it would be difficult adjust the respective values, and the carriage would be into rably cumbersome. All civilized nations adopted therefor very early the use of money; for we find Abraham givin " four hundred shekels of filver, current money with " merchant," for the field of Machpelah (s): though t practice of exchanges still subsists among several of the savage nations. But, with regard to the law of fales and exchang the

⁽o) Plowd. 308, 309. (p) Hardr. 200. 1 Ch. Rep. 15 (q) Lord Raym. 760. (r) Noy's Max. c. 42. (s) Gen. c 23. v. 16.

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treis no difference. I shall therefore treat of them both under tenomination of sales only; and shall consider their force of effect, in the first place where the vendor bath in himself, assembly where he bath not, the property of the thing sold.

Where the vendor bath in himself the property of the ods sold, he hath the liberty of disposing of them to whomever pleases, at any time, and in any manner: unless judgment abeen obtained against him for a debt or damages, and the it of execution is actually delivered to the sheriff. For then, the statute of frauds (s), the sale shall be looked upon as adulent and the property of the goods shall be bound to swer the debt, from the time of delivering the writ. Forally it was bound from the teste, or issuing, of the writ (t), if any subsequent sale was fraudulent; but the law was a latered in favour of purchasors, though it still remains after the awarding and before the delivery of the writ, goods are bound by it in the hands of his executors (v).

fra man agrees with another for goods at a certain price, may not carry them away before he hath paid for them; it is no sale without payment, unless the contrary be existy agreed. And therefore, if the vendor says, the price iteast is four pounds, and the vendee says he will give four ands, the bargain is struck; and they neither of them are at any to be off, provided immediate possession be tendered by other side. But if neither the money be paid, nor the dis delivered, nor tender made, nor any subsequent agreet be entered into, it is no contract, and the owner may sole of the goods as he pleases (u). But if any part of the its paid down, if it be but a penny, or any portion of the dis delivered by way of earness (which the civil law calls the and interprets to be "emptionis-venditionis contracta" argu-

¹²⁹ Car. II. c. 3. (t) 8 Rep. 171. 1 Mod. 188. (v) 33. 12 Mod. 5. 7 Mod. 95. (u) Hob. 41. Noy's Max.

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" argumentum (w)," the property of the goods is absolute bound by it : and the vendee may recover the goods by actio as well as the vendor may the price of them (x). And fu regard does the law pay to earnest as an evidence of a contra that, by the same statute 29 Car. II. c. 3. no contract fort fale of goods, to the value of 101. or more, shall be valid, unle the buyer actually receives part of the goods fold, by way earnest on his part; or unless he gives part of the price to vendor by way of earnest to bind the bargain, or in part payment; or unless some note in writing be made and fign by the party, or his agent, who is to be charged with the co tract. And, with regard to goods under the value of 10%. contract or agreement for the fale of them shall be valid. less the goods are to be delivered within one year, or un the contract be made in writing, and figned by the party is to be charged therewith. Antiently, among all the north nations, shaking of hands was held necessary to bindthe gain; a custom which we still retain in many verbal contra A fale thus made was called handfale, " venditio per mut "manuum complexionem (y);" till in process of time the s word was used to fignify the price or earnest, which was ven immediately after the shaking of hands, or instead ther

As foon as the bargain is struck, the property of the good transferred to the vendee, and that of the price to the vende but the vendee cannot take the goods, untill he tenders the pagreed on (z). But if he tenders the money to the vendor, and refuses it, the vendee may seife the goods, or have an adagainst the vendor for detaining them. And by a regular without delivery, the property is so absolutely vested in the dee, that if A sells a horse to B for 101. and B pays him earns or signs a note in writing of the bargain; and afterwards, but the delivery of the horse or money paid, the horse dies into vendor's custody; still he is entitled to the money, because

⁽w) Inft. 3. tit. 24. jure Goth. l. 2. c. 5.

⁽x) Noy, Ibid. (z) Hob. 41.

⁽y) Stiernhook

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the contract, the property was in the vendee (a). Thus may property in goods be transferred by fale, where the vendor bath such property in himself.

But property may also in some cases be transferred by sale. though the vendor bath none at all in the goods: for it is exnedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must foon be at an end. And therefore the general rule of law is (b), that all fales and contracts of any thing vendible, in fairs or markets overt, (that is, open) shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the mirror informs us (c), were tolls established in markets, viz. to testify the making of contracts; for every private contract was discountenanced by law. Wherefore our Saxon ancestors prohibited the sale of any thing above the value of twenty-pence, unless in open market, and directed every bargain and fale to be contracted in the presence of credible witnesses (d). Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day (e). The market place, or fpot of ground fet apart by custom for the sale of particular goods, is also in the country the only market overt (f); but in London every shop in which goods are exposed publicly to fale, is market overt, for fuch things only as the owner professes to trade in (g). But fmy goods are stolen from me, and fold, out of market overt, my property is not altered, and I may take them wherever I and them. And it is expressly provided by statute I Jac. I. 6.21. that the fale of any goods wrongfully taken, to any pawnbroker in London or within two miles thereof, shall not alter the property. For this, being usually a clandestine trade, Vol. II.

⁽a) Noy. c. 42. (b) 2 Inft. 713. (c) c. 1. §. 3. (d) LL. Ethel. 10. 12. LL. Eadg. Wilk. 80. (e) Cro. Jac. 68. (f) Godb. 131. (g) 5 Rep. 83. 12 Mod. 521.

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is therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the king fuch fale (though regular in all other respects) will in no cal bind him; though it binds infants, feme coverts, idiots orly natics, and men beyond sea or in prison : or if the goods h stolen from a common person, and then taken by the king officer from the felon, and fold in open market; still, if the owner has used due diligence in prosecuting the thief to con viction, he loses not his property in the goods (h). So like wife, if the buyer knoweth the property not to be in the fel ler, or there be any other fraud in the transaction; if h knoweth the feller to be an infant, or feme covert, not usually trading for herself; if the sale be not originally and wholl made in the fair or market, or not at the usual hours; the owner's property is not bound thereby (i). If a man buyshi own goods in a fair or market, the contract of fale shall no bind him so as that he shall render the price, unless the pro perty had been previously altered by a former sale (k). And notwithstanding any number of intervening sales, if the origina vendor, who fold without having the property, comes again into possession of the goods, the original owner may take them when found in his hands who was guilty of the first breacho justice (1). By which wife regulations the common law ha fecured the right of the proprietor in personal chattels from being devested, so far as was consistent with that other neces fary policy, that purchasors, bona side, in a fair, open, and regular manner, should not be afterwards put to difficultie by reason of the previous knavery of the seller.

But there is one species of personal chattels, in which the property is not so easily altered by sale, without the express consent of the owner, and those are horses; the sale of which even in fairs or markets overt, is void in many instances where that of other property is valid: because a horse is so fleet an animal, that the stealers of them may sly far off in a short space (m), and be out of the reach of the most industrious owner.

(h) Bacon's use of the law 158. (k) Perk. § 93. (1) 2 Inst. 713.

⁽i) 2 Inft. 713, 714 (m) Ivid. 714.

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er. All persons therefore that have occasion to deal in fes, and are therefore liable sometimes to buy stolen ones. ald do well to observe, that whatever price they may give, ow long foever they may keep possession before it be claimthey gain no property in a horse that has been stolen, unit be bought in a fair or market overt: nor even then, es the directions be purfued that are laid down in the sta-12 P. & M. c. 7. and 31 Eliz. c. 12. By which it is fed, that every horse, so to be sold, shall be openly exd, in the time of fuch fair or market, for one whole hour ther, between ten in the morning and funfet, in the open public place used for such sales, and not in any private yard able: that the horse shall be brought by both the vendor and dee to the toll-gatherer or book-keeper of such fair or ket: that toll be paid if any due; and if not, one penny he book-keeper, who shall enter down the price, colour, marks, with the names, additions, and abode of the venand the vendor; the latter either upon his own knowlege, he testimony of some credible witness. And, even if all spoints be fully complied with, yet fuch fale shall not take wthe property of the owner, if within fix months after the is stolen he puts in his claim before the mayor, or some ke, of the district in which the horse shall be found; and in forty days after that, proves such his property by the of two witnesses before such mayor or justice; and also ders to the person in possession, such price as he bona side for him in market overt. But in case any one of the points me-mentioned be omitted, or not observed in the sale, such is utterly void; and the owner shall not lose his property, at any distance of time may seise or bring an action for his t, wherever he happens to find him. Wherefore fir Ed-Coke observes (n), that, both by the common law and two statutes, the property of horses is so well preserved, tif the owner be of capacity to understand them, and be ant and industrious to pursue the same, it is almost imble that the property of any horse, either stolen or not

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stolen, should be altered by any fale in market overt by he that is malae sidei possessor.

By the civil law (0) an implied warranty was annexed every fale, in respect to the title of the vendor: and so too, our law, a purchasor of goods and chattels may have a tisfaction from the seller, if he sells them as his own, and title proves deficient, without any express warranty for t purpose (p). But, with regard to the goodness of the was so purchased, the vendor is not bound to answer; unless expressly warrants them to be sound and good (q), or unless them to be otherwise and hath used any art to guise them (r), or unless they turn out to be different from the trepresented to the buyer.

2. BAILMENT, from the French bailler, to deliver, is a livery of goods in trust, upon a contract expressed or impl that the trust shall be faithfully executed on the part of bailee. As if cloth be delivered, or (in our legal dialect) b ed, to a taylor to make a fuit of cloaths, he has it upon implied contract to render it again when made, and that workmanly manner (s). If money or goods be delivered common carrier, to convey from Oxford to London, h under a contract in law to pay, or carry, them to the pe appointed (t). If a horse, or other goods, be delivered t inn-keeper or his fervants, he is bound to keep them fat and restore them when his guest leaves the house (u). If a takes in a horse, or other cattle, to graze and depasture in grounds, which the law calls agistment, he takes them an implied contract to return them on demand to the owner If a pawnbroker receives plate or jewels as a pledge, or f rity, for the repayment of money lent thereon at a day cer he has them upon an express contract or condition to re them, if the pledgor performs his part by redeeming the due time (x): for the due execution of which contract, n

⁽a) Ff 21. 2. 1. (p) Cro. Jac. 474. 1 Roll. Above (c) F. N. B. 94. (r) 2 Roll. Rep. 5. (s) 1 Vern. 1 (t) 12 Mod. 482. (u) Cro. Eliz. 622. (w) Cro. 271. (x) Cro. Jac. 245. Yelv. 178.

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ful regulations are made by statute 30 Geo. II. c. 24. And if a landlord diffreins goods for rent, or a parish officer for nes, these for a time are only a pledge in the hands of the freinors, and they are bound by an implied contract in law restore them on payment of the debt, duty, and expenses, fore the time of sale; or, when fold, to render back the eplus. If a friend delivers any thing to his friend to keep thim, the receiver is bound to restore it on demand: and it sformerly held that in the mean time he was answerable for y damage or loss it might fustain, whether by accident or herwise (y): unless he expressly undertook (z) to keep it only in the fame care as his own goods, and then he should not answerable for theft or other accidents. But now the law ems to be fettled upon a much more rational footing (a); at fuch a general bailment will not charge the bailee with wolofs, unless it happens by gross neglect, which is conmed to be an evidence of fraud; but, if the bailee underies specially to keep the goods safely and securely, he is und to answer all perils and damages, that may befal them swant of the fame care with which a prudent man would ep his own (b).

In all these instances there is a special qualified property ansferred from the bailor to the bailee, together with the posfion. It is not an absolute property in the bailee, because this contract for restitution; and the bailor hath nothing thin him but the right to a chose in action, grounded upon the contract, the possession being delivered to the bailee. Ind, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as interest the agisting farmer, the pawnbroker, the unknown, the agisting farmer, the pawnbroker, the distresion,

^{(2) 4} Rep. 84. (a) Lord Raym.

(b) By the laws of Sweden, the depomy or bailee of goods is not bound to restitution, in case of acmore: jura enim nostra," says Stiernhook, "dolum praesumunt,
ma non pereant." (De jure Sueon. 1. 2. c. 5.)

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distreinor, and the general bailee, may all of them vindica in their own right, this their possessory interest, against stranger or third person (c). For, as such bailee is response to the bailor, if the goods are loft or damaged by wilful fault or gross negligence, or if he do not deliver up the ch tels on lawful demand, it is therefore reasonable that should have a right to recover either the specific goods, else a satisfaction in damages, against all other persons, w may have purloined or injured them; that he may always ready to answer the call of the bailor.

3. HIRING and borrowing are also contracts by which qualified property may be transferred to the hirer or borrow in which there is only this difference, that hiring is always a price, a stipend, or additional recompense; borrowing merely gratuitous. But the law in both cases is the far They are both contracts, whereby the possession and a tra fient property is transferred for a particular time or use, condition and agreement to reftore the goods fo hired or b rowed, as foon as the time is expired or use performed; gether with the price or stipend (in case of hiring) either preffly agreed on by the parties, or left to be implied by according to the value of the service. By this mutual contra the hirer or borrower gains a temporary property in the th hired, accompanied with an implied condition to use it w moderation and not abuse it; and the owner or lender retain a reversionary interest in the same, and acquires a new property in the price or reward. Thus if a man hires or bor-mode rows a horse for a month, he has the possession and a qualified lifes, property therein during that period; on the expiration of Ifr which his qualified property determines, and the owner beduced comes (in case of hiring) entitled also to the premium of with price, for which the horse was hired (d).

THERE is one species of this price or reward, the mo usual of any, but concerning which many good and learned me

⁽d) Yelv. 172. Cro. Jac. 236. (c) 13 Rep. 69.

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have in former times very much perplexed themselves and other people, by raising doubts about its legality in foro conficientiae. That is, when money is lent on a contract to receive not only the principal sum again, but also a compensation for the use; which is generally called interest by those who think it lawful, and usury by those who do not so. It may not be amiss therefore to enter into a short enquiry, upon what sooting this matter of interest or usury does really stand.

THE enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is laid down by Aristotle (e), that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution, which was only between the purposes of exchange, and not of increase. Hence the school divines have branded the practice of taking interest, as being contrary to the divine law both natural and revealed: and the canon law (f) has proscribed the taking any, the least, increase for the loan of money as a mortal sin.

But, in answer to this, it may be observed, that the mohim accept was clearly a political, and not a moral, pretept. It only prohibited the Jews from taking usury from
their brethren the Jews; but in express words permitted them
to take it of a stranger (g): which proves that the taking of
bor moderate usury, or a reward for the use, for so the word siglifes, is not malum in se, since it was allowed where any but
an Israelite was concerned. And as to Aristotle's reason, detime with equal force be alleged of houses, which never breed
wuses; and twenty other things, which nobody doubts it is
awful to make profit of, by letting them to hire. And
though

⁽e) Polit. 1. 1. c. 10. (f) Decretal. 1, 5. tit. 19. (g) "Unto a stranger thou mayest lend upon usury, but unto thy brother thou shalt not lend upon usury." Deut. xxiii. 20.

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though money was originally used only for the purposes of exchange, yet the laws of any state may be well justified in permitting it to be turned to the purposes of profit, if the convenience of fociety (the great end for which money was invented) shall require it. And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowleded principle, that commerce cannot fubfift without mutual and extensive credit. Unless money therefore can be borrowed. trade cannot be carried on : and if no premium were allowed for the hire of money, few persons would care to lend it; or at least the ease of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when mens' minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and again introduced with itself its inseparable companion, the doctrine of loans upon interest.

AND, really, confidered abstractedly from this its use, fince all other conveniencies of life may either be bought or hired but money can only be hired, there feems no greater impropriety in taking a recompense or price for the hire of this, than of any other convenience. If I borrow roo! to employ in beneficial trade, it is equitable that the lender should have proportion of my gains. To demand an exorbitant price i equally contrary to conscience, for the loan of a horse, o the loan of a fum of money: but a reasonable equivalent so the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his lofing it entirely, i not more immoral in one case than it is in the other. And indeed the absolute prohibition of lending upon any, even moderate interest, introduces the very inconvenience which feems meant to remedy. The necessity of individuals will make borrowing unavoidable. Without some profit allowed dher thou that not lend upon y ury." Det.

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wed by by law, there will be but few lenders: and those principally had men, who will break through the law, and take a profit; and then will endeavour to indemnify themselves from the danger of the penalty, by making that profit exorbitant. Thus, while all degrees of profit were discountenanced, we find more complaints of usury, and more flagrant instances of oppression, than in modern times, when money may be had na low interest. A capital distinction must therefore be made between a moderate and exorbitant profit; to the former of which we usually give the name of interest, to the latter the truly odious appellation of usury: the former is neeffary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated fociey. For, as the whole of this matter is well fummed up by Grotius (h), " if the compensation allowed by law does not "exceed the proportion of the hazard run, or the want felt, "by the loan, its allowance is neither repugnant to the re-"vealed nor the natural law; but if it exceeds those bounds, "it is then oppressive usury; and though the municipal laws "may give it impunity, they never can make it just."

WE see, that the exorbitance or moderation of interest, for money lent, depends upon two circumstances; the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate therefore of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom: for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public sommunity there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running cash in his own shop: all above this necessary

(h) de. j. b. & p. l. 2. c. 12. §. 22.

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fary quantity may be spared of lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be: but where there is not enough, or barely enough, circulating cash to answer the ordinary uses of the public, interest will be proportionably high; for lenders will be but few, as sew can submit to the inconvenience of lending.

So also the hazard of an entire loss has its weight in the regulation of interest: hence, the better the security, the lower will the interest be; the rate of interest being generally in a compound ratio, formed out of the inconvenience and the hazard. And as, if there were no inconvenience, there should be no interest, but what is equivalent to the hazard; so, if there were no hazard, there ought to be no interest, fave only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to three per cent: a man that has money by him will perhaps lend it upon good personal security at five per cent, allowing two for the hazard run; he will lend it upon landed fecurity, or mortgage, at four per cent, the hazard being proportionably less: but he will lend it to the state, on the maintenance of which all his property depends, at three per cent, the hazard being none at all.

But sometimes the hazard may be greater, than the rate of interest allowed by law will compensate. And this gives rise to the practice, 1. Of bottomry, or respondentia. 2. Of policies of insurance.

AND first, bottomry (which originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to resit) is in the nature of a most-gage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the

Ch. 30. thip (pars pro toto) as a fecurity for the repayment. In which case it is understood, that, if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he hall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender (i). And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the veffel, but upon the goods and merchandize, which must necessarily be fold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract: who therefore in this case is faid to take up money at respondentia. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant 1000l, to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed (k): which kind of agreement is sometimes called foenus nauticum, and fometimes usura maritima (1). But, as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II. c. 37. that all monies lent on bottomry or at respondentia, on vessels bound to or from the East-Indies, shall be expressly lent only upon the ship or upon the merchandize; that the lender shall have the benefit of salvage; and that, if the borrower has not on board effects to the value of the fum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandize be totally loft. regiserus sant arm

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⁽i) Moll. de jur. mar. 361. Malyne. lex mercat. b. 1. c. 31. Cro. Jac. 208. Bynkersh. quaest. jur. privat. 1 3. c. 26. () Molloy. ibid. Malyne ibid. 1 Sid. 27.

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SECONDLY, a policy of insurance is a contract between A and B, that, upon A's paying a premium equivalent to the hazard run, B will indemnify or infure him against a particular event. This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For if I infure a thip to the Levant, and back again, at five per cent; here I calculate the chance that she performs her voyage to be twenty to one against her being loft: and, if she be loft, I lose rool. and get 51. Now this is much the same as if I'lend the merchant, whose whole fortunes are embarked in this vessel, 100% at the rate of eight per cent. For by a loan I should be immediately out of my money, the inconvenience of which we have computed equal to three per cent: if therefore I had actually lent him 100l. I must have added 31. on the score of inconvenience, to the st. allowed for the hazard; which together would have made 81. But as, upon an infurance, I am never out of my money till the lofs actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life infured till the time of repayment; for which he is loaded with an additional premium, fuited to his age and conflitution. Thus, if Sempronius has only an annuity for life and would borrow 100% of Titius for a year; the inconvenience and general hazard of this loan, we have feen, are equivalent to 51. which is therefore the legal interest: but there is also a special hazard in this case; for, if Sempronius dies within the year, Titius must lose the whole of his 100%. Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 101. more; and therefore that the reasonable rate of interest in this case would be fifteen per cent. But this the law, to avoid abuses, will not permit to be taken: Sempronius therefore gives Titius the lender only 31. the legal interest; but applies to Gaius an infurer, and gives him the other 10%. V

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to indemnify Titius against the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time.

THE learning relating to marine infurances hath of late rears been greatly improved by a feries of judicial decisions, which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence. being founded on equitable principles, which chiefly refult from the special circumstances of the case, it is not easy to reduce them to any general heads in mere elementary institutes. Thus much may however be faid; that, being contracts, the very effence of which confilts in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment: and, on the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament. But, as a practice had obtained of infuring large fums without having any property on board, which were called infurances, interest or no interest; and also of insuring the fame goods feveral times over; both of which were a species of gaming, without any advantage to commerce, and were denominated wagering policies: it is therefore enafted by the statute 19 Geo. II. c. 37. that all insurances, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of falvage to the infurer, (all which had the ame pernicious tendency) shall be totally null and void. except upon privateers, or ships in the Spanish and Portuguese trade, for reasons sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead; and lastly that, in the East-Indiatrade, the lender of money on bottomry, or at respondentia, shall

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alone have a right to be infured for the money lent, and the borrower shall (in case of a loss) recover no more upon any insurance than the surplus of his property, above the value of his bottomry or respondentia bond. But, to return to the doctrine of common interest on loans:

UPON the two principles of inconvenience and hazard, compared together, different nations have at different times established different rates of interest. The Romans at one time allowed centesimae, one per cent monthly or twelve per cent per annum, to be taken for common loans; but Justinian (m) reduced it to trientes, or one third of the as or centesimae; that is, four per cent; but allowed higher interest to be taken of merchants, because there the hazard was greater (n). So too

(m) Cod. 4. 32. 26. Nov. 33, 34, 35. (n) A short explication of these terms, and of the division of the Roman as, will be useful to the student, not only for understanding the civilians, but also the more classical writers, who perpetually refer to this distribution. Thus Horace, ad Pisones. 325.

It is therefore to be observed, that, in calculating the rate of interest, the Romans divided the principal sum into an hundred parts; one of which they allowed to be taken monthly; and this, which was the highest rate of interest permitted, they called usura centesime, amounting yearly to twelve per cent. Now as the as, or Roman pound, was commonly used to express any integral sum, and was divisible into twelve parts or uncie, therefore these twelve monthly payments or uncia were held to amount annually to one pound, or as usurarius; and fo the usura affes were synonymous to the usura centesima. And all lower rates of interest were denominated according to the relation they bore to this centelima ulury, or usure affes : for the several multiples of the uncie, of duodecimal parts of the as, were known by different names ac cording to their different combinations; fextans, quadrans, triens quincunx, semis, septunx, bes, dodrans, dextans, deunx, containing parts of an as. (Ff. 28. 5. 50 § 2. Gravin. orig. jur. civ. l. 2. § 47.) This being premited, the following table will clearly exhibit at once the fut divisions of the as, and the denominations of USURAE the rate of interest.

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too Grotius informs us (o), that in Holland the rate of interest was then eight per cent. in common loans, but twelve to merchants. Our law establishes one standard for all alike, where the pledge or fecurity itself is not put in jeopardy; left, under the general pretence of vague and indeterminate hazards, a door should be opened to fraud and usury: leaving specific hazards to be provided against by specific insurances, or by loans upon respondentia, or bottomry. But as to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has encreased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9. confined interest to ten per cent. and so did the fatute 13 Eliz. c. 8. But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, fo under her successor the statute 21 Jac. I. c. 17. reduced it to eight per cent. as did the ftatute 12 Car. II. c. 13. to fix: and laftly by the statute 12 Ann. st. 2. 16. it was brought down to five per cent. yearly, which is now the extremity of legal interest that can be taken. But yet, if a contract, which carries interest, be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made (p). Thus Irish. American,

USURAE.	PARTES Assis.		PE	PER ANNUM.		
Asses, sive centesimae	-inte	ger —	_	12	per cent.	
Deunces	- 1	<u> </u>		11		
Dextances, vel decun	ces —	5		10	The Unit	
Dodrantes — —				9		
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Septunces -		<u> </u>		7	to set 4 st	
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Quincunces -		<u> </u>		5		
Trientes — — —	'	1 -		4		
Quadrantes — —		<u>i</u>		3		
Sextances		<u>i</u>	-	2		
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⁽⁰⁾ de jur. b. & p. 2. 12. 22. (p) 1 Equ. Cas. abr. 289. 1 P. Wms. 395.

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American, Turkish, and Indian interest, have been allowed in our courts, to the amount of even twelve per cent. For the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade.

4. The last general species of contracts, which I have to mention, is that of debt; whereby a chose in action, or right to a certain fum of money, is mutually acquired and loft (q). This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the fum agreed on; and the vendor has a property in this price, as a chose in action, by means of this contract of debt. In bailment, if the bailee loses or detains a fum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that he shall execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like. Any contract in short whereby a determinate fum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquifition; being usually divided into debts of record, debts by fpecial, and debts by simple contract.

A DEBT of record is a sum of money, which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judicature. Recognizances also are a sum of money, recognized or acknowledged to be due to the

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crown or a subject, in the presence of some court or magistrate with a condition that such acknowlegement shall be void upon the appearance of the party, his good behaviour, or the like: and these, together with statutes merchant and statutes staple, &c. if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, viz. debts of record; since the contract, on which they are founded, is witnessed by the highest kind of evidence, viz. by matter of record.

DEBTS by specialty, or special contract, are such whereby a sum of money becomes, or is acknowled to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation: which last we took occasion to explain in the twentieth chapter of the present book; and then shewed that it is an acknowledement or creation of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like: on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

which focus a min at the most different part of the world may

DEBT'S by fimple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise. It is easy to see into what a wast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionly hinted at; and the rest, to avoid repetition, must be referred to those particular heads in the third book of these commentaries, where the breach of such contracts will be considered. I shall only observe at

present, that by the statute 29 Car. II. c. 3. no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement or some memorandum thereof be in writing, and signed by the party himself or by his authority.

But there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of paper credit, deserves a more particular regard. These are debts by bills of exchange, and promissory notes.

A BILL of exchange is a fecurity, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has fince spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a fum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A lives in Jamaica, and owes B who lives in England 1000l. now if C be going from England to Jamaica, he may pay B this 1000/. and take a bill of exchange drawn by B in England upon A in Jamaica, and receive it when he comes thither. Thus does B receive his debt, at any distance of place, by transferring it to C; who carries over his money in paper credit, without danger of robbery or lofs. This method is faid to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw their effects out of France and England, into those countries in which they had chosen to refide. But the invention of it was a little earlier: for the Jews were banished out of Guienne in 1287, and out of England

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England in 1290 (r); and in 1236 the use of paper credit was introduced into the Mogul empire in China (s). In common speech such a bill is frequently called a draught, but a bill of exchange is the more legal as well as mercantile expression. The person however, who writes this letter, is called in law the drawer, and he to whom it is written the drawee; and the third person, or negotiator, to whom it is payable (whether specially named, or the bearer generally) is called the payee.

THESE bills are either foreign, or inland: foreign, when drawn by a merchant residing abroad upon his correspondent in England, or vice versa; and inland, when both the drawer and the drawee reside within the kingdom. Formerly soriegn bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 W. III. c. 17. the other 3 & 4 Ann. c. 9. inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such (t), being by those statutes expressly enacted with regard to the other. So that there is now in law no manner of difference between them.

PROMISSORY notes, or notes of hand, are a plain and direct engagement in writing, to pay a fum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also by the same statute 3 & 4 Ann. c. 9. are made assignable and indorfable in like manner as bills of exchange.

THE payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the express contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his implied contract; viz. that, provided

⁽r) 2 Carte. 203. 206.

⁽s) Mod. Un. Hift. iv. 499.

⁽t) 1 Roll. Abr. 6.

provided the drawee does not pay the bill, the drawer will; for which reason it is usual, in bills of exchange, to express that the value thereof hath been received by the drawer (u); in order to shew the consideration, upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no chose in action is assignable: which assignment is the life of paper credit. It may therefore be of some use, to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons, than those with whom he originally contracted.

In the first place then the payee, or person to whom or whose order such bill of exchange or promissory note is payable may by indorfement, or writing his name in dorfo or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may affign the same to another, and so on in infinitum. And a promissory note, payable to A or bearer, is negotiable without any indorfement, and payment thereof may be demanded by any bearer of it (v). But, in case of a bill of exchange, the payee, or the indorsee, (whether it be a general or particular indorsement) is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing (w), he then makes himfelf liable to pay it; this being now a contract on his fide, grounded on an acknowlegement that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20% or upwards, and expressed to be for value received, the payee or indorfee may protest it for non-acceptance: which protest must be made in writing, under a copy of fuch bill of exchange, by some notary public; or, if no such notary

⁽u) Stra. 1212. (v) 2 Show. 235.—Grant v. Vaughan. T. 4. Geo. III. B. R. (w) Stra. 1000.

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notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within sourteen days after, be given to the drawer.

Bur, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called days of grace) the payee or indorfee is then to get it protested for non-payment, in the same manner and by the same persons who are to protest it in case of non-acceptance: and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing fuch protest, either of non-acceptance, or non-payment, is bound to make good to the payee, or indorfee, not only the amount of the faid bills, (which he is bound to do within a reasonable time after nonpayment, without any protest, by the rules of the common law) (x) but also interest and all charges, to be computed from the time of making fuch protest. But if no protest be made or notified to the drawer, and any damage accrues by fuch neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable shall in convenient time give the drawer notice thereof: for otherwise the law will imply it paid: fince it would be prejudicial to commerce, if a bill might rife up to charge the drawer at any distance of time; when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee (y).

If the bill be an endorfed bill, and the indorfee cannot get the drawee to discharge it, he may call upon either the drawer or the indorfor, or if the bill has been negotiated through many

⁽x) Lord Raym. 993.

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many hands, upon any of the indorsor; for each indorsor is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorsor, as of the drawer. And if such indorsor, so called upon, has the names of one or more indorsors prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorsor has nobody to resort to, but the drawer only.

What has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another: only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather, the law considers a promissory note in the light of a bill drawn by a man upon himself, accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsor.

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CHAPTER THE THIRTY FIRST.

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OF TITLE BY BANKRUPTCY.

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THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

X. BANKRUPTCY; a title which we before lightly butched upon (a), as far as it related to the transfer of the ral estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of that tels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us therefore first of all consider, 1. Who may become a bankrupt:

1. What acts make a bankrupt: 3. The proceedings on a commission of bankrupt: and, 4. In what manner an estate in goods and chattels may be transferred by bankruptcy.

1. Who may become a bankrupt. A bankrupt was be
fore (b) defined to be "a trader, who secretes himself, or does

certain other acts, tending to defraud his creditors." He

was formerly considered in the light of a criminal or offen
for(c); and in this spirit we are told by fir Edward Coke (d),

that we have fetched as well the name, as the wickedness, of

bank-

⁽a) See pag. 285. (b) Ibid. (c) Stat. 1 Jac. I. c. 15. §. (d) 4 Inft. 277.

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bankrupts from foreign nations (e). But at present the laws of bankruptcy are confidered as laws calculated for the benefit of trade, and founded on the principles of humanity as wel as justice; and to that end they confer some privileges, no only to the creditors, but also to the bankrupt or debtor him felf. On the creditors; by compelling the bankrupt to give up all his effects to their use, without any fraudulent conceal ment: on the debtor; by exempting him from the rigor of the general law, whereby his person might be confined a the discretion of his creditor, though in reality he has nothing to fatisfy the debt; whereas the law of bankrupts, taking int confideration the fudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they furrender up their whole estate to be divided amon their creditors.

In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut to debtor's body into pieces, and each of them take his proportionable share: if indeed that law, de debitore in partes secondo, is to be understood in so very butcherly a light; which many learned men have with reason doubted (f). Nor do mean those less inhuman laws (if they may be called so, as the meaning is indisputably certain) of imprisoning the debtor person in chains; subjecting him to stripes and hard labour at the mercy of his rigid creditor; and sometimes selling him his wife, and children, to perpetual foreign slavery trans to berim (g): an oppression, which produced so many popular

⁽e) The word itself is derived from the word bancus or banque which signifies the table or counter of a tradesman. (Dusresne, 969.) and ruptus, broken; denoting thereby one whose shop or plate of trade is broken and gone; though others rather chuse to add the word route, which in French signifies a trace or track, and us that a bankrupt is one who hath removed his banque, leaving a trace behind. (4 Inst. 277.) And it is observable that the to of the first English statute concerning this offence. 34 Hen. VIII 4. "against such persons as do make bankrupt," is a literal trantion of the French idiom, qui font banque route. (f) Tay Comment. in L. decemviral. Byakersh. Observ. Jur. 1. 1. Heine Antiqu. III. 30. 4. (g) In Pegu, and the adjacent countries

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insurrections, and successions to the mons sacer. But I mean the law of cession, introduced by the christian emperors; whereby, if a debtor ceded, or yielded up, all his fortune to his creditors, he was secured from being dragged to a goal, womin quoque corporali cruciatu semoto (h)." For, as the emperor justly observes (i), "inbumanum erat spoliatum fortunis suis in solidum damnari." Thus far was just and reasonable: but, as the departing from one extreme is apt to produce its opposite, we find it afterwards enacted (k), that if the debtor by any unforeseen accident was reduced to low circumstances, and would swear that he had not sufficient lest to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law, which under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

THE laws of England, more wifely, have steered in the middle between both extremes ; providing at once against the inhumanity of the creditor, who is not fuffered to confine an honest bankrupt after his effects are delivered up; and at the ame time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of mcouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual traders; fince that fet of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, withoutany fault of their own. If persons in other situations of life run in debt without the power of payment, they must ake the confequences of their own indifcretion, even though they meet with sudden accidents that may reduce their forunes: for the law holds it to be an unjustifiable practice, or any person but a trader to encumber himself with debts of my confiderable value. If a gentleman, or one in a liberal VOL. II. profession.

Last India, the creditor is entitled to dispose of the debtor himself, and likewise of his wife and children; insomuch that he may even solute with impunity the chastity of the debtor's wife: but then, is solving, the debt is understood to be discharged. (Mod. Un. Inst. VII. 128. (h) Cod. 7.71. tot. (i) Inst. 4.6. 40.

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profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if at fuch time, he has no fufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he fuffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwife. Trade cannot be carried on without mutual credit on both fides: the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortune therefore of debtors the law has given a compassionate remedy, but denied it to their faults: fince at the fame time that it provides for the fecurity of commerce, by enacting that every confiderable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also to difcourage extravagance declared, that no one shall be capable of being made a bankrupt, but only a trader; nor capable of receiving the full benefit of the statutes, but only an industrious trader.

THE first statute made concerning any English bankrupts, was 34 Hen. VHI. c. 4. when trade began first to be properly cultivated in England: which has been almost totally altered by statute 13 Eliz. c. 7. whereby bankruptcy is confined to such persons only as have used the trade of merchandize, in gross or by retail, by way of bargaining, exchange, bartering, chevisance (1), or otherwise; or have sought their living by buying and selling. And by statute 21 Jac. I. c. 19. persons using the trade or profession of a scrivener, receiving other mens moneys and estates into their trust and custody, are also made liable to the statutes of bankruptcy: and the benefits, as well as the penal parts of the law, are extended as well

⁽¹⁾ that is, making contracts. (Dufresne. II. 569.

to aliens and denizens as to natural born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. By many subsequent statutes, but lastly by statute 5 Geo. II. c. 30. (m) bankers, brokers, and factors, are declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners are included by the statute of James I. viz. for the relief of their creditors; whom they have otherwise more opportunities of defrauding than any other fet of dealers ; and they are properly to be looked upon as traders, fince they make merchandize of money, in the same manner as other merchants do of goods and other moveable chattels. But by the same act (n), no farmer. grazier, or drover, shall (as such) be liable to be deemed a bankrupt: for, though they buy and fell corn, and hay, and beafts, in the course of husbandry, yet trade is not their prinipal, but only a collateral, object; their chief concern being to manure and till the ground, and make the best advantage of its produce. And, besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the fecurity which the law has given them above all others, for the payment of their reserved rents: wherefore also, upon asimilar reason, a receiver of the king's taxes is not capable (1), as fuch, of being a bankrupt; left the king should be defeated of those extensive remedies against his debtors, which we put into his hands by the prerogative. By the same staute (p), no person shall have a commission of bankrupt awarded against him, unless at the petition of some one creditor, whom he owes rool; or of two to whom he is indebted 1501. or of more, to whom all together he is indebted 2001. for the law does not look upon persons, whose debts amount less, to be traders considerable enough, either to enjoy the benefit of the statutes, themselves, or to entitle the creditors, or the benefit of public commerce, to demand the distribution of their effects, ; ediagram maintaining to to

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In the interpretation of these several statutes, it hath been held, that buying only, or felling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and also getting a livelyhood by it. As, by exercising the calling of a merchant, a grocer, a mercer, or, in one general word, a chapman, who is one that buys and fells any thing. But no handicraft occupation (where nothing is bought and fold, and therefore an extensive credit, for the stock in trade, is not neceffary to be had) will make a man a regular bankrupt; as that of a husbandman, a gardener, and the like, who are paid for their work and labour (q). Also an inn-keeper cannot, as fuch, be a bankrupt (r): for his gain or livelyhood does not arise from buying and selling in the way of merchandize, but greatly from the use of his rooms and furniture, his attendance, and the like: and though he may buy corn and victuals, to fell again at a profit, yet that no more makes him a trader than a schoolmaster or other person is, that keeps a boarding house, and makes confiderable gains by buying and felling what he spends in the house, and such a one is clearly not within the statutes (s). But where persons buy goods, and make them up into faleable commodities, as shoe-makers, fmiths, and the like; here, though part of the gain is by bodily labour, and not by buying and felling, yet they are within the statutes of bankrupts (t); for the labour is only in melioration of the commodity, and rendering it more fit for fale.

On E single act of buying and selling will not make a man a trader; but a repeated practice, and profit by it. Buying and selling bank-stock, or other government securities, will not make a man a bankrupt; they not being goods, wares, or merchandize, within the intent of the statute, by which a profit may be fairly made (u). Neither will buying and selling under particular restraints, or for particular purposes; as if a commissioner

⁽q) Cro. Car. 31. (r) Cro. Car. 549. Skinn. 291. (s) Skinn. 292. 3 Mod. 330. (t) Cro. Car. 31. Skinn. 292 (u) 2 P. Wms. 308.

missioner of the navy uses to buy victuals for the seet, and dispose of the surplus and resuse, he is not thereby made a trader within the statutes (w). An infant, though a trader, cannot be made a bankrupt: for an infant can owe nothing but for necessaries; and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts, which he is not liable at law t pay (x). But a seme-covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt (y).

2. HAVING thus confidered who may, and who may not, be made a bankrupt, we are to inquire, fecondly, by what alls a man may become a bankrupt. A bankrupt is " a trader, "who fecretes himfelf, or does certain other acts, tending to " defraud his creditors." We have hitherto been employed in explaining the former part of this description, " a trader:" let us now attend to the latter, " who fecretes himfelf, or does " certain other acts, tending to defraud his creditors." And in general, whenever such a trader, as is before described, hath endeavoured to avoid his creditors or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out. this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible: that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes, and the resolutions formed by the courts thereon. Among these X 3 may

⁽w) 1 Salk. 110. Skin. 292. (x) Lord Raym. 443. (y). La Vie. v. Philips. M. 6. Geo. III. B. R.

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may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himself from the jurisdiction and coercion of the law, with intent to defraud his creditors (z). 2. Departing from his own house, with intent to secrete himfelf, and avoid his creditors (a). 3. Keeping in his own house, privately, fo as not to be feen or spoken with by his creditors, except for just and necessary cause; which is likewise construed to be an intention to defraud his creditors, by avoiding the process of the law (b). 4. Procuring or suffering himself willingly to be arrested, or outlawed, or imprisoned, withoutjust and lawful cause; which is likewise deemed an attempt to defraud his creditors (c). 5. Procuring his money, goods, chattels, and effects to be attached or sequestered by any legal process; which is another plain and direct endeavour to difappoint his creditors of their fecurity (d). 6. Making any fraudulent conveyance to a friend, or secret trustee, of his lands, tenements, goods, or chattels; which is an act of the same fuspicious nature with the last (e). 7. Procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests; which also is an endeavour to elude the justice of the law (f). 8. Endeavouring or desiring, by any petition to the king, or bill exhibited in any of the king's courts against any creditors, to compel them to take less than their just debts; or to procrastinate the time of payment, originally contracted for; which are an acknowlegement of either his poverty or his knavery (g). 9. Lying in prison for two months, or more, upon arrest or other detention for debt, without finding bail, in order to obtain his liberty (h). For the inability to procure bail argues a strong deficiency in his credit, owing either to his suspected poverty, or ill character; and his neglect to do it, if able, can arise only from a fraudulent intention: in either of which cases it is high time for his creditors

⁽z) Stat. 13 Eliz. c. 7. (a) Ibid. 1 Jac. I. c. 15. (b) Stat. 13 Eliz c. 7. (c) Ibid. 1 Jac. I. c. 15. (d) Stat. 1 Jac. I. c. 16. (e) Ibid. (f) Stat. 21. Jac. I. c. 19. (g) Ibid. (h) Ibid.

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creditors to look to themselves, and compel a distribution of his effects. 10. Escaping from prison after an arrest for a just debt of 100l. or upwards (i). For no man would break prison, that was able and desirous to procure bail; which brings it within the reason of the last case. 11. Neglecting to make fatisfaction for any just debt to the amount of 100l. within two months after fervice of legal process, for fuch debt, upon any trader having privilege of parliament (k).

THESE are the feveral acts of bankruptcy, expressly defined by the statutes relating to this title: which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction, or implication. And therefore fir John Holt held (1), that a man's removing his goods privately, to prevent their being feifed in execution, was no act of bankruptcy. For the statutes mention only fraudulent gifts to third persons, and procuring them to be feifed by fham process, in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of those cases, cannot be adjudged an act of bankrupt-So also it has been determined expressly, that a ban-. ker's stopping or refusing payment is no act of bankruptcy; for it is not within the description of any of the statutes, and there may be good reasons for his so doing, as suspicion of forgery, and the like : and if, in consequence of such refusal, he is arrested, and puts in bail, still it is no act of bankruptcy (m): but if he goes to prison, and lies there two months, then, and not before, is he become a bankrupt.

WE have feen who may be a bankrupt, and what all will make him fo: let us next confider,

3. THE proceedings on a commission of bankrupt; so far as they affect the bankrupt himself. And these depend entirely on X 4 the

⁽i) Stat. 21 Jac. I. c. 19. (k) Stat. 4 Geo. III. c. 33. (1) Lord Raym. 725. (m) 7 Mod. 139.

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the several statutes of bankruptcy (n); all which I shall endeavour to blend together, and digest into a concise methodical order.

AND, first, there must be a petition to the lord chancellor by one creditor to the amount of 100% or by two to the amount of 150l. or by three or more to the amount of 200l; upon which he grants a commission to such discreet persons as to him shall feem good, who are then styled commissioners of bankrupt. The petitioners, to prevent malicious applications, must be bound in a fecurity of 2001. to make the party amends in case they do not prove him a bankrupt. And, if on the other hand they receive any money or effects from the bankrupt, as a recompense for suing out the commission, so as to receive more than their ratable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made, as well to secure perfons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the commission is awarded and issued, the commissioners are to meet, at their own expense, and to take an oath for the due execution of their commission, and to be allowed a fum not exceeding 20s. per diem each, at every fitting. And no commission of bankrupt shall abate, or be void, upon any demise of the crown.

WHEN the commissioners have received their commission, they are first to receive proof of the person's being a trader, and having committed some act of bankruptcy; and then to declare him a bankrupt, if proved so; and to give notice thereof in the gazette, and at the same time to appoint three meetings. At one of these meetings an election must be made of assignees, or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; which assignees are to be chosen by the major part, in value, of the creditors

⁽n) 13 Eliz.c. 7. 1 Jac. I. c. 15. 21 Jac. I. c. 19. 7 Geo. I. c. 31. 5 Geo. II. c. 30. 19 Geo. II. e. 32. & 24 Geo. II. c. 57.

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be originally appointed by the commissioners, and afterwards approved or rejected by the creditors: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the ballance of accounts does not amount to 101. And at the third meeting, at sarthest, which must be on the forty-second day after the advertisement in the gazette, the bankrupt, upon notice also personally served upon him or left at his usual place of abode, must surrender himself personally to the commissioners, and must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default thereof, shall be guilty of selony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors.

In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace, be apprehended and committed to the county goal, in order to be forthcoming to the commissioners; who are also empowered immediately to grant a warrant for seising his goods and papers.

When the bankrupt appears, the commissioners are to examine him touching all matters relating to his trade and effects. They may also summon before them, and examine, the bankrupt's wife and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them shall refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any goaler, permitting such persons to escape, or go out of prison, shall forseit 500l, to the creditors.

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THE bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and essects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners; (except the necessary apparel of himself, his wise, and his children) or, in case he conceals, or embezzles any essects to the amount of 201. or withhold any books or writings, with intent to desirand his creditors, he shall be guilty of selony without benefit of clergy (0).

AFTER the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to five per cent. out of the effects so discovered, and such farther reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forseit rool. and double the value of the estate concealed, to the creditors,

HITHERTO every thing is in favour of the creditors; and the law feems to be pretty rigid and fevere against the bankrupt: but, in case he proves honest, it makes him full amends for all this rigor and severity. For if the bankrupt hath made an ingenuous discovery, hath conformed to the directions of the law, and hath acted in all points to the satisfaction of his creditors; and if they, or four parts in five of them in number and value, (but none of them creditors for less than 201.) will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the lord chancellor; and he, or

⁽o) By the laws of Naples all fraudulent bankrupts, particularly fuch as do not furrender themselves within four days, are punished with death: also all who conceal the effects of a bankrupt, or set up a pretended debt to defraud his creditors. Mod. Un. Hill. xxviii, 320.)

two judges whom he shall appoint, on oath made by the bankrupt that fuch certificate was obtained without fraud, may allow the fame; or disallow it, upon cause shewn by any of the creditors of the bankrupt. tooman and as itellience and the salimony of his creditors themfelves of his hones ar

If no cause be shewn to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For if his effects will not pay one half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and affignees, to have a competent fum allowed him, not exceeding three per cent: but if they pay ten shillings in the pound, he is to be allowed five per cent; if twelve shillings and fixpence, then feven and a half per cent; and if fifteen shillings in the pound, then the bankrupt shall be allowed ten per cent: provided, that fuch allowance do not in the first case exceed 2001. in the second 2501. and in the third 3001.(p).

BESIDES this allowance, he has also an indemnity granted him, of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts; and for that among other purposes, all proceedings on commission of bankrupt are on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account : though, in general, the production of the certificate properly allowed HH To buy or readily reported to the selection

alfred wich deeth. Perfent who amte bee (p) By the Roman law of ceffion, if the debtor acquired any confiderable property subsequent to the giving up of his all, it was liable to the demands of his creditors. (Ff. 42. 3. 4.) But this did not extend to such allowance as was left to him on the score of compassion, for the maintenance of himself and family. Si quid misericordiae causa ei fuerit relictum, puta menstruum wel annuum, alimentorum nomine, non oportet propter koc bona ejus iterato venundant: nec enim fraudandus est alimentis cottidianis. (Ibid. l. 6.)

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shall be sufficient evidence of all previous proceedings. Thus the bankrupt becomes a clear man again; and, by the affistance of his allowance and his own industry, may become a useful member of the commonwealth; which is the rather to be expected, as he cannot be entitled to these benefits, but by the testimony of his creditors themselves of his honest and ingenious disposition; and unless his failures have been owing to misfortunes, rather than to misconduct and extravagance.

For no allowance or indemnity shall be given to a bank. rupt, unless his certificate be figned and allowed, as beforementioned; and also, if any creditor produces a fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all title to these advantages. Neither can he claim them, if he has given with any of his children above 100l. for a marriage portion, unless he had at that time sufficient left to pay all his debts; or if he has lost at any one time sl. or in the whole rool. within a twelvemonth before he became bankrupt, by any manner of gaming or wagering whatfoever; or, within the fame time, has lost to the value of sool. by stockiobbing. Also, to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of infolvency: which is an occasional act, frequently passed (q) by the legislature; whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile state of life are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath, at the fessions or assises; in which case their perjury or fraud is usually, as in case of bankrupts, punished with death. Persons who have been once cleared by this, or either of the other methods, (of composition with their creditors, or bankruptcy) and afterwards become bankrupts

⁽q) Stat. 32 Geo. II. c. 28. I Geo. III. c. 17. 5 Geo. III. c. 41. 9 Geo. III. c. 26.

rupts again, unless they pay full fifteen shillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, houshold goods, and the tools and implements of their trades.

THUS much for the proceedings on a commission of bankrupt, so far as they affect the bankrupt himself personally. Let us next consider,

4. How such proceedings affect or transfer the estate and property of the bankrupt. The method whereby a real estate, in lands, tenements, and hereditaments, may be transferred by bankruptcy, was shewn under its proper head, in a former chapter (r). At present therefore we are only to consider the transfer of things personal by this operation of law.

By virtue of the statutes before-mentioned all the personal estate and essects of the bankrupt are considered as vested, by the act of bankruptcy, in the future assignees of his commissioners, whether they be goods in actual possession, or debts, contracts or other choses in action; and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broken open, in order to enter upon and seise the same. And, when the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it (s).

THE property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for. Therefore it is usually said, that once a bankrupt, and always a bankrupt: by which

(r) pag. 285.

(s) 12 Mod. 324,

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is meant, that a plain direct act of bankruptcy once committed cannot be purged, or explained away, by any fubfequent conduct, as a dubious equivocal act may be (t); but that, if a commission is afterwards awarded, the commission and the property of the affiguees shall have a relation, or reference. back to the first and original act of bankruptcy (u). Infomuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from fuch as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be fued out, but not ferved and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the affignees. But the king is not bound by this fictitious relation, nor is it within the statutes of bankrupts (w); for if, after the act of bankruptcy committed and before the affignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby (x). In France this doctrine of relation is carried to a very great length; for there every act of a merchant, for ten days precedent to the act of bankruptey, is presumed to be fraudulent, and is therefore void (y). But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by statute 19 Geo. II. c. 32. that no money paid by a bankrupt to a bona fide or real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor, by statute I Jac. I. c. 15. shall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

THE affignees may purfue any legal method of recovering this property so vested in them, by their own authority; but cannot

⁽t) Salk. 110. (u) 4 Burr. 32. (w) 1 Atk. 262. (x) Viner. Abr. t. creditor and bankr. 104. (y) Sp. L. b. 29. c. 16.

cannot commence a fuit in equity, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the confent of the creditors, or the major part of them in value, at a meeting to be held in purfuance of notice in the gazette.

WHEN they have got in all the effects they can reasonably hope for, and reduced them to ready money, the affignees must, within twelve months after the commission issued, give one and twenty days notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. And then the commissioners shall direct a dividend to be made, at 6 much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to the quantity of their debts; no regard being had to the quality of them. Mortgages indeed, for which the creditor has a real fecurity in his own hands, are entirely fafe: for the commission of bankrupt reaches only the equity of redemption (z). So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. And, upon the equity of the statute 8 Ann. c. 14. (which dinots, that, upon all executions of goods being on any premias demised to a tenant, one year's rent and no more shall, if due, be paid to the landlord) it hath also been held, that under a commission of bankrupt, which is in the nature of a latute-execution, the landlord shall be allowed his arrears of ent to the same amount, in preference to other creditors, even hough he hath neglected to distrein, while the goods remained on the premises; which he is otherwise entitled to do for his tire rent, be the quantum what it may (a). But, othervile, judgments and recognizances, (both which are debts frecord, and therefore at other times have a priority) and fo bonds and obligations by deed or special instrument (which recalled debts by specialty; and are usually the next in order) thefe

⁽z) Finch. Rep. 466.

⁽a) 1 Atk. 103, 104.

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these are all put on a level with debts by mere simple contract and all paid pari passu. Nay, so far is this matter carried that, by the express provision of the statutes, debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day, shall be paid equally with the rest(b), allowing a discount or drawback in proportion. And insurances, and obligations upon bottomry or respondentia bond side made by the bankrupt, though forseited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy.

WITHIN eighteen months after the commission issued, a fecond and final dividend shall be made, unless all the effects were exhausted by the first. And if any surplus remains. after paying every creditor his full debt, it shall be restored to the bankrupt. This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily, commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any fuspicious or malevolent creditor will take the advantage of fuch acts, and fue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence; except that upon fatisfaction made to all the creditors, the commission may be superseded This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission to do them that justice, which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, in case of a surplus left after payment of every debt, fuch interest shall again revive, and be chargeable on the bankrupt (d), or his representatives.

CHAPTER

(b) Lord Raym. 1549. (c) 2 Ch. Caf. 144. (d) 1 Atk. 244.

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CHAPTER THE THIRTY-SECOND.

OF TITLE BY TESTAMENT, AND ADMINISTRATION.

THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, viz. by testament and administration. And these I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

XI, XII. In the pursuit then of this joint subject, I shall, first, enquire into the original and antiquity of testaments and administrations; shall, secondly, shew who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents; shall, fourthly, shew what an executor and administrator are, and how they are to be appointed; and, lastly, shall select some few of the general heads of the office and duty of executors and administrators.

First, as to the original of testaments and administrations. We have more than once observed, that, when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which

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which introduced the doctrine and practice of alienations gifts, and contracts. But these precautions would be ver fhort and imperfect, if they were confined to the life only o the occupier; for then upon his death all his goods would again become common, and create an infinite variety of firif and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and, in defect of fuch appointment or nomination, the law of every fociety has directed the goods to be vested in certain particular individuals, exclusive of all other persons (a). The former method of acquiring personal property, according to the express directions of the deceased, we call a testament: the latter, which is also according to the will of the deceased, not expressed indeed but presumed by the law (b), we call in England an administration; being the same which the civil lawyers term a fuccession ab intestato, and which answers to the descent or inheritance of real estates.

TESTAMENTS are of very high antiquity. We find them in use among the antient Hebrews; though I hardly think the example ustally given (c), of Abraham's complaining (d) that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to shew that he had made him so by will. And indeed a learned writer (e) has adduced this very passage to prove, that in the patriarchal age, on failure of children or kindred, the fervants born under their mafter's roof succeeded to the inheritance as heirs at law (f). But, (to omit what Eusebius and others have related of Noah's testament, made in writing and witnessed under his feal, whereby he disposed of the whole world) (g) I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings (h), wherein Jacob bequeaths to his fon Joseph a portion

⁽a) Puff. L. of N. b. 4. c. 10. (b) Ibid. b 4. c. 11. (c) Barbeyr. Puff. 4. 10. 4. Godolph. Orph. Leg. 1. 1. (d) Gen. c. 15. (e) Taylor's elem. civ. law. 517. (f) See pag. 12. (g) Selden. de fucc. Ebr. c. 24. (h) Gen. c. 48.

portion of his inheritance double to that of his brethren: which we will find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two feveral inheritances affigned them; whereas the descendants of each of the other patriarchs formed only one fingle tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens (i); but in many other parts of Greece they were totally discountenanced (k). In Rome they were unknown, till the laws of the twelve tables were compiled, which first gave the right of bequeathing (1): and among the northern nations, particularly among the Germans (m), testaments were not received into use. And this variety may ferve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state (n); which has permitted it in some countries, and denied it in others: and, even where it is permitted by law, it is subjected to different formalities and refrictions in almost every nation under heaven (o).

WITH us in England this power of bequeathing is co-eval with the first rudiments of the law; for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "Sive quis incuria, "sive morte repentina, fuerit intestatus mortuus, deminus ta-"men nullum rerum suarum partem (practer eam quae jure "debetur hereoti nomine) sibi assumito. Verum pessessiones "uxori, liberis, et cognatione proximis, pro suo cuique jure, "distribuantur (p)." But we are not to imagine, that the power of bequeathing extended originally to all a man's personal estate. On the contrary, Glanvil will inform us (q),

⁽i) Plutarch. in vita Solon. (k) Pott. Antiq. l. 4. c. 15. (l) Inft. 2. 22. 1. (m) Tacit. de mor. Germ. 21. (n) See 128. 13. (o) Sp. L. b. 27. c. 1. Vinnius in Inft. l. 2. tit. 10. (p) LL. Canut. c. 68. (q) l. 2. c. 5.

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that by the common law, as it stood in the reign of Henry the fecond, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal descendants another to his wife, and the third was at his own disposal: or if he died without a wife, he might then dispose of one moiety and the other went to his children; and so e converso, if he had no children, the wife was entitled to one moiety, and he might bequeath the other: but, if he died without either wife or issue, the whole was at his own disposal (r). The shares of the wife and children were called their reasonable parts; and the writ de rationabili parte bonorum was given to recover it (s).

THIS continued to be the law of the land at the time of magna carta, which provides, that the king's debts shall first of all be levied, and then the relidue of the goods shall go to the executor to perform the will of the deceased; and, i nothing be owing to the crown, " omnia catalla cedant de " functo; salvis uxori ipsius et pueris suis rationabilibus par " tibus fuis (t)." In the reign of king Edward the third thi right of the wife and children was still held to be the univerfal or common law (u); though frequently pleaded as the local custom of Berks, Devon, and other counties (w): and fir Henry Finch lays it down expressly (x), in the reign of Charles the first, to be the general law of the land. Bu this law is at present altered by imperceptible degrees, and the deceafed may now by will bequeath the whole of his good and chattels; though we cannot trace out when first this alte ration

(1) Bracton. 1. 2. c. 26. Flet. 1. 2. c 57. (-) F. N B. 122 (u) A widow brought an action o (t) 9 Hen. III. c. 18. detinue against her husband's executors, quod cum consuetudinen totius regni Angliae hactenus usitatam et approbatam, uxores de bent et solent à tempore, &c. habere suam rationabilem partem bo norum maritorum suorum : ita videlicet, quod si nullus habuerint li beros, tunc medietatem ; et, si habuerint, tunc tertiam partem, &c and that her husband died worth 200,000 marks, without issue had between them; and thereupon the claimed the moiety. Some ex ceptions were taken to the pleadings, and the fact of the husband's dying without iffue was denied; but the rule of law, as stated in the writ, feems to have been univerfally allowed. (M. 30. Edw. III 25.) And a similar case occurs in H. 17 Edw. III 9. (w) Reg. Brev. 142. Co. Litt. 176. (x) Law. 175.

tion began. Indeed fir Edward Coke (y) is of opinion, hat this never was the general law, but only obtained in parinlar places by special custom: and to establish that doctrine erelies on a passage in Bracton, which in truth, when comared with the context, makes against his opinion. racton (z) lays down the doctrine of the reasonable part to the common law; but mentions that as a particular exption which fir Edward Coke has hastily cited for the geral rule. And Glanvil, magna carta, Fleta, the yearwks, Fitzherbert, and Finch, do all agree with Bracton, that this right to the pars rationabilis was by the common w: which also continues to this day to be the general law four fifter kingdom of Scotland (a). To which we may d, that, whatever may have been the custom of later years many parts of the kingdom, or however it was introduced derogation of the old common law, the antient method conmued in use in the province of York, the principality of Vales, and the city of London, till very modern times: ten, in order to favour the power of bequeathing, and to duce the whole kingdom to the same standard, three states have been provided; the one 4 & 5 W. and M. c. 2. exained by 2 & 3 Ann. c. 5. for the province of York; ano-tr 7 & 8 W. III. c. 38. for Wales; and a third, 11 Geo. I. 18. for London: whereby it is enacted, that persons withink proper) dispose of all their personal estates by will; in the claims of the widow, children, and other relations, the contrary, are totally barred. Thus is the old common m, now utterly abolished throughout all the kingdom of agland, and a man may devise the whole of his chattels as mely, as he formerly could his third part or moiety. In difde ling of which, he was bound by the custom of many places was stated in a former chapter) (b) to remember his d and the church, by leaving them his two best chattels, ad wich was the original of heriots and mortuaries; and afterands he was left at his own liberty, to bequeath the reainder as he pleased.

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(2) 1. 2. c. 26. §. 2. (a) Dalrymp. feud. property. 145. (b) pag. 426.

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In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, faid to die intestate; and in such cases it is faid, that by the old law the king was entitled to feife upon his goods, as the parens patriæ, and general trustee of the kingdom (c). This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and fuitors, in their own courts baron and other courts, or to have their wills there proved, in case they made any disposition (d). Afterwards the crown, in favour of the church, invested the prelates with this branch of the prerogative; which was done, faith Perkins (e), because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the foul of the deceafed. The goods therefore of intestates were given to the ordinary by the crown; and he might feile them, and keep them without wasting, and also might give, alien, or fell them at his will, and dispose of the money in pios usus: and, if he did otherwise, he broke the confidence which the law reposed in him (f). So that properly the whole interest and power, which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in fuch superstitious uses as the mistaken zeal of the times had denominated pious (g). And, as he had thus the disposition of intestates effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the fatisfaction of the prelate, whose right of distributing his chattels for the good of his foul was effectually superfeded thereby.

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(a) I necessary type. (b)

⁽c) 9 Rep. 38.

de he was left at h. own tillog (d) Ibid. 37. (e) §. 486. (f) Finch.

⁽g) Plowd. 227. Law. 173, 174.

THE goods of the intestate being thus vested in the ordiary upon the most folemn and conscientious trust, the reveand prelates were therefore not accountable to any, but to and themselves, for their conduct (h). But even in Fleis time it was complained (i), " quod ordinarii, bujusmodi bona nomine ecclesiae occupantes, nullam vel saltem indebitam faciant distributionem." And to what a length of inimity this abuse was carried, most evidently appears from a ols of pope Innocent IV (k), written about the year 1250; herein he lays it down for established canon law, that " in Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiae et pauperum dispensanda est." Thus the poh clergy took to themselves (1) (under the name of the arch and the poor) the whole residue of the deceased's inte, after the partes rationabiles, or two thirds, of the fe and children were deducted; without paying even his wful debts, or other charges thereon. For which reason it senacted by the statute of Westm. 2. (m) that the ordinary all be bound to pay the debts of the intestate so far as his ods will extend, in the same manner that executors were and in case the deceased had left a will: a use more truly ous, than any requiem, or mass for his soul. This was the tcheck given to that exorbitant power, which the law dentrusted with ordinaries. But, though they were now de liable to the creditors of the intestate for their just and wful demands, yet the residuum, after payment of debts, mained still in their hands, to be applied to whatever puries the conscience of the ordinary should approve. grant abuses of which power occasioned the legislature in to interpose, in order to prevent the ordinaries from ping any longer the administration in their own hands, or of their immediate dependents: and therefore the statute

⁽k) in Deh) Plowd. 277. (i) 1. 2. c. 57 §. 10. tal. l. 5. t. 3. c. 42. (1) The proportion given to the th, and to other pious uses, was different in different countries. the archdeaconry of Richmond in Yorkshire, this proportion was tled by a papal bull, A. D. 1254. (Regist. honoris de Richm. and was observed tile abolished by the statute 26 Hen. VIII. (m) 13 Edw. I. c. 19.

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tute 31 Edw. III. c. 11. provides, that, in caseof intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which fingles out the next and most lawful friend of the intestate; who is interpreted (n) to be the next of blood that is under no legal disabilities. The statute 21 Hen. VIII. c. 5. enlarges a little more the power of the ecclefiastical judge; and permits him to grant administration either to the widow, or the next of kin, or to both of them, at his own discretion; and, where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

Upon this footing stands the general law of administrations at this day. I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to shew the original and gradual progress of testaments and administrations; in what manner the latter was sirst of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

I PROCEED now, fecondly, to enquire who may, or may not make a testament; or what persons are absolutely obliged by law to die intestate. And this law (0) is intirely prohibitory; for regularly every person hath sull power and liberty to make a will, that is not under some special prohibition by law or custom: which prohibitions are principally upon three accounts.

⁽n) 9 Rep. 39.

⁽o) Godolph. Orrh. Leg. p. 1. r. 7.

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for want of fufficient discretion; for want of sufficient liberty and free will; and on account of their criminal conduct.

- 1. In the first species are to be reckoned infants, under the age of fourteen if males, and twelve if females; which is the rule of the civil law (p). For, though some of our common lawvers have held that an infant of any age (even four years old) might make a testament (q), and others have denied that under eighteen he is capable (r), yet as the ecclefiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclefiaftical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age: but, if the testator was not of sufficient discretion, whether at the age of fourteen or four and twenty, that will overthrow his testament. Madmen, or otherwise non compotes, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their fenses besotted with drunkenness, --- all these are incapable, by reason of mental disability, to make any will so long as such disability lasts. To this class also may be referred such persons as are born deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having animum testandi, and their testaments are therefore void.
- 2. SUCH persons, as are intestable for want of liberty or freedom of will, are by the civil law of various kinds; as prisoners, captives, and the like (s). But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of the particular circumstances of dures, whether or no such persons could be supposed to have liberum animum testandi. And, with regard to feme-coverts, our laws differ still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a seme-sole (t). But with us a married woman is not only Vol. II.

⁽p) Godolph. p. 1. c. 8. Wentw. 212. 2 Vern. 104. 469. Gilb. Rep. 74. (q) Perkins. §. 503. (r) Co. Litt. 89. (s) Godolph. p. 1. c. 9. (t) Ff. 31. 1. 77.

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utterly incapable of devising lands, being excepted out of the statute of wills, 34 & 35 Hen. VIII. c. 5. but also she is incapable of making a testament of chattels, without the licence of her husband. For all her personal chattels are absolutely his own; and he may dispose of her chattels real, or shall have them to himself if he survives her: it would be therefore extremely inconfiftent, to give her a power of defeating that provision of the law, by bequeathing those chattels to another (v). Yet by her husband's licence she may make a testament (u); and the husband, upon marriage, frequently covenants with her friends to allow her that licence: but fuch licence is more properly his affent; for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will (w). Yet it shall be sufficient to repel the husband from his general right of administring his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed (x). So that in reality the woman makes no will at all, but only fomething like a will (y); operating in the nature of an appointment, the execution of which the husband by his bond, agreement, or covenant, is bound to allow. A diffinction fimilar to which, we meet with in the civil law, For, though a fon who was in potestate parentis could not by any means make a formal and legal testament, even though his father permitted it (z), yet he might, with the like permission of his father, make what was called a donatio mortis causa (a). The queen consort is an exception to this general rule, for the may dispose of her chattels by will, without the consent of her lord (b): and any feme-covert may make her will of goods, which are in her possession in auter droit, as executrix or administratrix; for these can never be the property of the husband (c): and, if she has any pinmoney or separate maintenance, it is said she may dispose of her savings thereout by testament, without the control of her huf-

⁽v) 4 Rep. 51. (u) Dr. & St. d. 1. c. 7. (w) Bro. Abr. tit. devije. 34. Stra. 891. (x) The king v. Bettefworth. T. 13 Geo. II. B. R. (y) Cro. Car. 376. 1 Mod. 211. (z) Ff. 28. 1. 6. (a) Ff. 39. 6. 25. (b) Co. Litt. 133. (c) Godolph. 1. 10.

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band (d). But, if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will (e).

3. PERSONS incapable of making testaments, on account of their criminal conduct, are in the first place all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a felo de se make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture (f). Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subfifts, for their goods and chattels are forfeited during that time (g). As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments, (as usurers, libellers, and others of a worse stamp) at the common law their testaments may be good (h). And in general the rule is, and has been fo at least ever fince Glanvil's time (j), quod libera sit cujus cunque ultima voluntas.

LET us next, thirdly, consider what this last will and testament is, which almost every one is thus at liberty to make; or the nature and incidents of a testament. Testaments both Justinian (i) and sir Edward Coke (k) agree to be so called, because they are testatio mentis: an etymon, which seems to savour too much of the conceit; it being plainly a substantive derived from the verb testari, in like manner as juramentum, incrementum, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "voluntatis nostræ justa sententia de eo, quod quis post mortem "suam sieri velit (1):" which may be thus rendered into English, "the legal declaration of a man's intentions, which "he wills to be performed after his death." It is called

(d) Prec. Chan. 44. (e) 4 Rep. 60. 2 P. Wms. 624. (f) Plowd. 261. (g) Fitzh Abr. tit. de cont. 16. (h) Godolph. p. 1. c. 12. (j) l. 7. c. 5. (i) Infl. 2. 10. (k) 1 Infl. 111. 322, (l) Ff. 28. 1. 1.

fententia to denote the circumspection and prudence with which it is supposed to be made: it is voluntatis nostra fententia, because its efficacy depends on its declaring the testator's intention, whence in England it is emphatically styled his will: it is justa sententia; that is, drawn, attested, and published with all due solemnities and forms of law: it is de eo, quod quis post mortem suam sieri velit, because a testament is of no force till after the death of the testator.

These testaments are divided into two sorts; written, and werbal or nuncupative; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator in extremis before a sufficient number of witnesses, and afterwards reduced to writing. A codicil, codicillus, a little book or writing, is a supplement to a will; or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator (m). This may also be either written or nuncupative.

But, as nuncupative wills and codicils, (which were formerly more in use than at present, when the art of writing is become more universal) are liable to great impositions, and may occasion many perjuries, the statute of frauds, 29 Car. II. c. 3. enacts; 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to-writing, and read over to him, and approved; and unless the same be proved to have been so done by the oaths of three witnesses at the least; who, by statute 4 & 5 Ann. c. 16. must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in any wife be good, where the estate bequeathed exceeds 301. unless proved by three such witnesses, present at the making thereof (the Roman law requiring feven) (n) and unless they or some of them were specially required to bear witness

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⁽m) Godolph. p. 1, c. 1. §. 3.

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witness thereto by the testator himself; and unless it was made in his last fickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be furprized with fickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after fix months from the making, unless it were put in writing within fix days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow, or next of kin, to contest it if they think proper. Thus has the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself is fallen into disuse; and hardly ever heard of but in the only instance where favour ought to be shewn to it, when the testator is surprized by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loofe idle discourse in his illness; for he must require the by-standers to bear witness of such his intention: the will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent impositions from frangers: it must be in his last fickness; for, if he recovers, he may alter his dispositions, and has time to make a written will: it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience, or furprized.

As to written wills, they need not any witness of their publication. I speak not here of devises of lands, which are entirely another thing, a conveyance by statute, unknown to the feedal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good; provided sufficient proof can be had that it is his hand-writing (o). And though written in another man's hand, and never signed

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⁽o) Godolph. p. 1. c. 21. Gilb. Rep. 260.

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by the testator, yet if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate (p). Yet it is the safer, and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses: which hast was always required in the time of Bracton (q); or, rather, he in this respect has implicitly copied the rule of the civil law.

No testament is of any effect till after the death of the testator. "Nam omne testamentum morte consummatum est; et "voluntas testatoris est ambulatoria usque ad mortem (r)." And therefore, if there be many testaments, the last overthrows all the former (s): but the republication of a former will revokes one of a later date, and establishes the first again (t).

HENCE it follows, that testaments may be avoided three ways: 1. If made by a person labouring under any of theincapacities before-mentioned: 2. By making another testament of a later date: and, 3. By cancelling or revoking it. For, though I make a last will and testament irrevocable in the ftrongest words, yet I am at liberty to revoke it : because my own act or words cannot alter the disposition of law, so as to make that irrevocable, which is in its own nature revocable (u). For this, faith lord Bacon (w), would be for a man to deprive himself of that, which of all other things is most incident to human condition; and that is, alteration or repentance. It hath also been held that, without an express revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a prefumptive or implied revocation of his former will, which he made in his state of celibacy (x). The Romans were also wont to set aside testaments as being inospiciosa, deficient in natural duty, if they difinherited or totally paffed by (without

⁽p) Comyns. 452, 3, 4. (q) 1. 2. c. 26. (r) Co. Litt. 1.12. (s) Litt. §. 168. Perk. 479. (t) Perk. 478. (u) 8 Rep. 82. (w) Elem. c. 19. (x) Lord Raym. 441. 1 P. Wms. 304.

(without affigning a true and fufficient reason) (y) any of the children of the testator (z). But if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause; and in such case no querela inospiciosi testamenti was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling or some other express legacy, in order to disinherit him effectually: whereas the law of England makes no such wild suppositions of forgetfulness or infanity; and therefore, though the heir or next of kin be totally omitted, it admits no querela inospiciosi, to set aside such a testament.

WE are next to consider, fourthly, what is an executor, and what is an administrator; and how they are both to be appointed.

An executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts, and infants: nay, even infants unborn, or in ventre sa mere, may be made executors (a). But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, durante minore atate (b). In like manner as it may be granted durante absentia or pendente lite : when the executor is out of the realm (c), or when a fuit is commenced in the ecclefiaftical court touching the validity of the will (d). This appointment of an executor is effential to the making of a will (e): and it may be performed either by express words, or such as strongly imply the same. But if the teftator makes his will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act; in any of these cases, the ordinary must grant administration

(y) See book I ch. 16. (z) Inft. 2. 18. 1. (a) West. Symb. p. 1. § 635. (b) Went. Off. Ex. c. 18. (c) 1 Lutw. 342. (d) 2 P. Wins. 589, 590. (e) Went. c. 1. Plowd. 281.

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tion cum testamento annexo (f) to some other person; and then the duty of the administrator, as also when he is constituted only durante minore atate, &c. of another, is very little different from that of an executor. And this was law so early, as the reign of Henry II. when Glanvil (g) informs us, that "testamenti executores esse debent ii, quos testator ad hoc elegerit, et curam ifse commiserit: si vero testator nullos ad hoc mominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere."

But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the third, and Henry the eighth, beforementioned, direct. In confequence of which we may observe; 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband, or his representatives (h): and, of the husband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his uncretion. 2. I nat, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases (k). 3. That this nearness or propinquity of degree thall be reckoned according to the computation of the civilians (1); and not of the canonists, which the law of England adopts in the descent of real estates (m): because in the civil computation the intestate himself is the terminus, a quo the feveral degrees are numbered; and not the common ancestor, according to the rule of the canonifts. And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration; both which are indeed in the first degree; but with us (n) the children

⁽f) 1 Roll. Abr. 907. Comb. 20. (g) 1.7. c. 6. (h) Cro. Car. 106. Stat. 29 Car. II. c 3 1 P. Wms. 381. (i) Salk. 36. Stra. 532. (k) Stat. 28 H-n VIII. c. 5. See pag. 496. (l) Prec. Chanc. 593. (m) See pag. 204. 207. 224. (n) Godolph p. 2. c. 34. §. 1. 2 Vern. 125.

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are allowed the preference (o). Then follow brothers (p), grandfathers (q), uncles or nephews (r), (and the females of each class respectively) and lastly cousins. 4. The half blood is admitted to the administration as well as the whole: for they are of the kindred of the intestate, and only excluded from inheritances of land upon feodal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood (s): and the ordinary may grant administration to the fifter of the half, or the brother of the whole blood, at his own discretion (t). 5. If none of the kindred will take out administration, a creditor may, by custom, do it (u). 6. If the executor refuses, or dies intestate, the administration may be granted to the refiduary legatee, in exclusion of the next of kin (w). And, lastly, the ordinary may, in defect of all these, commit administration (as he might have done (x) before the statute Edw. III.) to such discreet person as he approves of: or may grant him letters ad colligendum bona defuncti, which neither make him executor nor administrator; his only business being to keep the goods in his fafe custody (y), and to do other acts for the benefit of such as are entitled to the property of the deceased (z). If a bastard, who has no kindred, being nullius filius, or any one elie that has no kindred, dies intestate and without wife or child, it hath formerly been held (a) that the ordinary might feife his goods, to take the committee of the new Y 5 in more timened of your and

(e) In Germany there was a long dispute, whether a man's children should inherit his effects during the life of their grandsather; which depends (s we shall see hereaster) on the same principles as the granting of administrations. At last it was agreed at the diet of Arensherg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being shelfen on both sides, those of the children obtained the victory; and so the law was established in their savour, that the issue of a person deceased shall be entitled to his goods and chattels in preference to his parents. (Med. Un. Hist, xxix, 28.)

(p) Harris, in Nov. 11-8, c. 2. (q) Piec. Chanc. 527, 1 P. Wins. 41. (r) Atk. 155. s) 1 Ventr. 425. (t) Aleyn. 36. Styl. 74. (u) Salk 38. (w) 1 Sid. 281. 1 Ventr. 219. (v) Plowd. 278. (y) Went. ch. 14. (2) 2 Inft. 398. (a) Salk. 37.

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and dispose of them in piosusus. But the usual course now is for some one to procure letters patent, or other authority, from the king; and then the ordinary of course grants administration to such appointee of the crown (b).

THE interest, vested in an executor by the will of the deceased, may be continued and kept alive by the will of the ame executor: fo that the executor of A's executor is to all intents and purposes the executor and representative of A himself (c); but the executor of A's administrator, or the administrator of A's executor, is not the representative of A (d). For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and fuch executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the adminiftrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it refults back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no privity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, of the goods of the deceased not administered by the former executor or administrator. And this administrator, de bonis non, is the only legal representative of the deceased in matters of personal property (e). But he may, as well as an original administrator, have only a limited or special administration committed to his care, viz. of certain specific effects, such as a term of years and the like; the rest being committed to others (f).

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⁽b) 3 P. Wms. 33. (c) Stat. 25 Edw. III. st. 5. c. 5. I Leon. 275. (d) Bro. Abr. tit. administrator. 7. (e) Styl. 225. (f) 1 Roll. Abr. 908. Godolph. p. 2. c. 30. Salk. 36.

HAVING thus shewn what is, and who may be, an executor or administrator, I proceed now, fifthly and lastly, to enquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and, secondly, that an executor may do many acts before he proves the will (g), but an administrator may do nothing till letters of administration are iffued; for the former derives his power from the will and not from the probate (h), the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased (i), and many other transactions) (k), he is called in law an executor of his own wrong, de fon tort, and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to fuch an intermeddling, as will charge a man as executor of his own wrong (1). Such a one cannot bring an action himself in right of the deceased (m), but actions may be brought against him. And, in all actions by creditors against fuch an officious intruder, he shall be named an executor, generally (n); for the most obvious conclusion, which strangers can form from his conduct, is that he hath a will of the deceafed, wherein he is named executor, but hath not yet taken probate thereof (o). He is chargeable with the debts of the deceased, so far as assets come to his hands (p): and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree (q), himself only

⁽g) Wentw. ch 3. (h) Comyns. 151. (i) 5 Rep. 33, 34. (k) Wentw. ch. 14. Stat. 43 Eliz. c. 8. (l) Dyer. 166. (m) Bro. Abr. t. administrator. 8. (n) 5 Rep. 31. (o) 12 Mod. 471. (p) Dyer. 166. (q) 1. Chan. Cas. 33.

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only excepted (r). And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages (s); unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt (t). But let us now see what are the power and duty of a rightful executor or administrator.

- 1. He must bury the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of devastation or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased (u).
- 2. THE executor, or the administrator durante minore atate, or durante absentia, or cum testamento annexo, must prove the will of the deceased: which is done either in common form, which is only upon his own oath before the ordinary, or his surrogate; or per testes, in more solemn form of law, in case the validity of the will be disputed (w). will is fo proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the feal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him: all which together is usually styled the probate. In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Cr. II. c. 10. enter into a bond with furcties, faithfully to execute his truft. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only

⁽t) 5 Rep. 30. Moor. 527. (1) 12 Mod. 441. 471. (t) Wentw. cb 14. (u) Salk. 195. Godelph. p. 2. c. 26. §. 4. (w) Godelph. p. 1. c. 20. §. 4.

proper ones: but if the deceased had bona notabilia, or chattels to the value of a hundred shillings, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative (x); whence the court where the validity of fuch wills is tried, and the office where they are registered, are called the prerogative court, and the prerogative office, of the provinces of Canterbury and York. Lyndewode, who flourished in the beginning of the fifteenth century, and was official to arch-bishop Chichele, interprets these hundred shillings to fignify folidos legales; of which he tells us feventy-two amounted to a pound of gold, which in his time was valued at fifty nobles or 161. 135. 4d. - He therefore computes (y) that the hundred shillings, which constituted bona notabilia, were then equal in current money to 231. 35. od. This will account for what is faid in our antient book, that bona notabilia in the diocese of London (z), and indeed every where else (a), were of the value of ten pounds by composition: for, if we pursue the calculations of Lyndewode to their full extent, and confider that a pound of gold is now almost equal in value to an hundred and fifty nobles, we shall extend the present amount of bona notabilia to nearly 70%. But the makers of the canons of 1603 understood this antient rule to be meant of the shillings current in the reign of James I. and have therefore directed (b) that five pounds shall for the future be the standard of bona notabilia, so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reafonable foundation: that, as the bishops were themselves originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority extends not. would

⁽x) 4 Inst 335. (y) Provin. l. 3. t. 13. c. item. v. centum. &c. statutum. v. laicis. (z) 4 Inst 335. Godolph. p. 2. c. (a) Plowd. 281. (b) Can. 92.

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(h) Geo. Car 2. c. 30.

would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had bona notabilia; besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make in fuch cases one administration serve for all. This accounts very fatisfactorily for the reason of taking out administration to intestates, that have large and diffusive property, in the prerogative court: and the probate of wills naturally follows, as was before observed, the power of granting administrations; in order to fatisfy the ordinary that the deceafed has, in a legal manner, by appointing his own executor, excluded him and his officers from the privivilege of administring the effects.

3. The executor or administrator is to make an inventory (c) of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. He is to collect all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased (d), and having the same property in his goods as the principal had when living, and the same remedies to recover them. And, if there be two or more executors, a sale or release by one of them shall be good against all the rest (e); but in case of administrators it is otherwise (f). Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called assets in the hands of the executor or administrator (g); that is, sufficient or enough (from the French asset) to make him chargeable to a creditor or legatee, so far as such goods

⁽c) Stat. 21. Hen. VIII. c. 5. (d) Co. Litt. 209. (e) Dyer. 23. (f) 1 Atk. 460. (g) See pag. 244.

goods and chattels extend. Whatever affets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which are the next thing to be considered; for,

5. THE executor or administrator must pay the debts of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of affets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges. and the expence of proving the will, and the like. Secondly, debts due to the king on record or specialty (h). Thirdly, fuch debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woollen (i), monev due on poor rates (k), for letters to the post-office (1), and some others. Fourthly, debts of record; as judgments (decketted according to the statute 4 & 5 W. & M. c. 20.) flatutes, and recognizances (m). Fifthly, debts due on fpecial contracts; as for rent, (for which the lessor has often a better remedy in his own hands, by diffraining) or upon bonds. covenants, and the like, under feal (n). Laftly, debts on simple contracts, viz. upon notes unsealed, and verbal promifes. Among these simple contracts, servants wages are by fome (o) with reason preferred to any other: and so stood the antient law, according to Bracton (p) and Fleta (q), who reckon, among the first debts to be paid, fervitia fervientium et stipendia famulorum. Among debts of equal degree, the executor or administrator is allowed to pay himself first; by retaining in his hands fo much as his debt amounts to (r). But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased: and would befides be taking advantage of their own wrong, which is contrary to the rule of law (s). If a creditor confitutes his debtor his executor, this is a release or discharge

⁽h) 1. And. 129. (i) Stat. 30. Car. II. c. 3. (k) Stat. 17. Geo. II. c. 38. (l) Stat. 9 Ann. c. 10. (m) 4 Rep. 60. Cro. Car 363. (n) Wentw. ch. 12. (o) 1 Roll. Abr. 927. (p) 1. 2. c. 26. (q) 1. 2. c. 57. §. 10. (i) 10 Mod. 496. (c) 5 Rep. 30.

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of the debt, whether the executor acts or no (t); provided there be affets sufficient to pay the testator's debts: for, though this discharge of the debt shall take place of all legacies, yet it were unfair to destraud the testator's creditors of their just debts by a release which is absolutely voluntary (u). Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt (w).

6. WHEN the debts are all discharged, the legacies claim the next regard; which are to be paid by the executor so far as his affets will extend: but he may not give himself the preference herein, as in the case of debts (x).

A LEGACY is a bequest, or gift, of goods and chattels by testament; and the person to whom it is given is styled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papifts, and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the affent of the executor: for if I have a general or pecuniary legacy of 1001. or a specific one of a piece of plate, I cannot in either case take it without the consent of the executor (y). For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator : the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our antient law(z), " de bonis defuncti primo deducenda sunt ea qua sunt necessi-" tatis, et postea qua sunt utilitatis, et ultimo qua sunt volun-"tatis." And in case of a deficiency of affets, all the general legacies must abate proportionably, in order to pay the debts; but a specific legacy (of a piece of plate, a horse, or

c 25. (i) / 21 c. 57 3-

⁽t) Plowd. 184. Salk. 299. (u) Salk. 303. 1 Roll. Abr. 921. (w) Dyer 32. 2 Leon. 60. (x) 2 Vern. 434. 2 P. Wins. 25. (y) Co. Litt. 111. Aleyn. 39. (z) l. 2. c. 26.

the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it (a). Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in, more than sufficient to exhaust the residuum after the legacies paid (b). And this law is as old as Bracton and Fleta, who tell us (c), "si plura sint debita, "vel plus legatum suerit, ad quæ catalla desuncti non sufficient, "siat ubique defalcatio, excepto regis privilegio."

If the legatee dies before the testator, the legacy is a lost or lapsed legacy, and shall fink into the residuum. And if a contingent legacy be left to any one; as, when he attains, or if he attains, the age of twenty-one; and he dies before that time; it is a lapted legacy (d). But a legacy to one, to be paid when he attains the age of twenty one years, is a wested legacy; an interest which commences in prasenti, although it be solvendum in futuro: and, if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable, in case the legatee had lived. This distinction is borrowed from the civil law (e); and its adoption in our courts is not fo much owing to its intrinsic equity, as to its having been before adopted by the ecclefiastical courts. For, fince the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he fued (f). But if fuch legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir (g); for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction. And, in case of a vefted legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, in-

⁽a) 2 Vern. 111. (b) Ibid. 205. (c) Bract. I. 2. c. 26. Flet. I. 2. c. 57. §. 11. (d) Dyer 59. 1 Equ. Caf. abr. 295. (e) Ff. 35. 1. 1. © 2. (f) 1 Equ. Caf. abr. 295. (g) 2 P. Wms. 601.

terest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator (h).

Besides these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a donation causa mortis. And that is, when a person in his last fickness, apprehending his diffolution near, delivers or causes to be delivered to another the possession of any personal goods, (under which have been included bonds, and bills drawn by the deceased upon his banker) to keep in case of his decease. This gift, if the donor dies, needs not the affent of his executor: yet it shall not prevail against creditors; and is accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or mortis causa (i). This method of donation might have subfisted in a state of nature, being always accompanied with delivery of actual possession (k); and so far differs from a testamentary disposition: but seems to have been handed to us from the civil lawyers (1), who themselves borrowed it from the Greeks (m),

7. When all the debts and particular legacies are discharged, the surplus or residuum must be paid to the residuary legatee, if any be appointed by the will; and, if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship (n). But, whatever ground there might have been formerly for this opinion, it seems now to be understood (o) with this restriction; that, although where the executor has no legacy at all the residuum shall

(h) 2 P. Wms. 26, 27. (i) Prec. Chan. 269. I P. Wms. 406. 441. 3 P. Wms. 357. (k) Law of forfeit. 16. (l) Inft. 2. 7. 1. Ff. 1. 39. t. 6. (m) There is a very complete donatio mortis caufa, in the Odyffey, b. 17. v. 78. made by Telemachus to his friend Piræus; and another by Hercules, in the Alcestes of Euripides, v. 1020. (n) Perkins. 525. (o) Prec. Chanc. 323. I P. Wms. 7. 544. 2 P. Wms. 338. 3 P. Wins. 43. 194. Stra. 559.

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hall in general be his own, yet wherever there is sufficient on the face of a will, (by means of a competent legacy or otherwife) to imply that the testator intended his executor should not have the residue, the undevised surplus of the estate shall go to the n xt of kin, the executor then standing upon exactly the fame footing as an administrator: concerning whom indeed there formerly was much debate (p), whether or no he could be compelled to make any distribution of the inteftate's estate. For though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law (q). And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute 29 Car. II. declaring only, that the statute of distributions does not extend to this case. But now these controversies are quite at an end; for by the flatute 22 & 23 Car. II. c. 10. it is enacted, that the furplufage of intestates' estates, except of femes covert (r), shall (after the expiration of one full year from the death of the intestate) be distributed in the following manner. One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety hall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree, and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters (s). The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have sufficiently spoken (t). And therefore by

⁽p) Godolph. p. 2. c. 32. (q) 1 Lev. 233. 2 P. Wms. 447. (r) Stat. 29 Car. II. c. 3. § 25. (s) Raym. 496. Lord Raym. (t) pag. 504.

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this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or iffue: in exclusion of the other fons and daughters, the brothers and fifters of the deceased. And fol the law still remains with respect to the father; but by statute I Jac. II. c. 17. if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

IT is obvious to observe, how near a resemblance this statute of distributions bears to our antient English law, de rationabili parte bonorum, spoken of at the beginning of this chapter (u); and which fir Edward Coke (w) himfelf, though he doubted the generality of its restraint on the power of devifing by will, held to be univerfally binding upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of fuccessions ab intestato (x): which, and because the act was also penned by an eminent civilian (y), has occasioned a notion that the parliament of England copied it from the Roman prætor: though indeed it is little more than a restoration, with some refinements and regulations, of our old conftitutional law: which prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So likewise there is another part of the statute of distributions, where directions are given, that no child of the intestate, (except his heir at law) on whom he fettled in his life-time any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplufage with their brothers and fifters; but if the estates so given

⁽u) page 492. (w) 2 Inft. 33. (x) The general rule of fuch fuccessions was this: 1. The children or lineal descendarts in equa portions. 2. On failure of thefe, the parents or lineal descendants and with them the breth en or filters of the whole blood; or if the parents were dead, all the brethren and fifters, together with the cu the representatives of a brother or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. (Ff. 38. 15. 1. Now. 118. c. 1, 2, 3, 127. c, 1.) (2) (y) Sir Walker. Lord Raym. 574.

them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision that been also said to be derived from the collatio bonorum of the imperial law (z): which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the antient custom of London, of the province of York, and of our sister kingdom of Scotland: and, with regard to lands descending in coparcenary, that it hath always been, and still is, the common law of England, under the name of interpot (a).

BEFORE I quit this subject, I must however acknowlege, hat the doctrine and limits of representation, laid down in the tatute of distributions, seem to have been principally borrowed from the civil law: whereby it will fometimes happen, that personal estates are divided per capita, and sometimes per sirs; whereas the common law knows no other rule of fuccefion but that per flirpes only (b). They are divided per capita, o every man an equal share, when all the claimants claim in heir own rights, as in equal degree of kindred, and not jure thrasentationis, in the right of another person. As if the ext of kin be the intestate's three brothers, A, B, and C; here his estate is divided into three equal portions, and distriuted per capita, one to each: but if one of these brothers, h, had been dead, leaving three children, and another, B, eaving two; then the distribution must have been per stirpes; one third to A's three children, another third to B's two hildren, and the remaining third to C the furviving brother: et if C had also been dead, without iffue, then A's and B's we children, being all in equal degree to the inteffate, would the in their own rights per capita, viz. each of them one ifth part (c).

THE statute of distributions expressly excepts and reserves to customs of the city of London, of the province of York,

⁽²⁾ Ff. 37. 6. 1. 1.14. pag. 217.

⁽a) See ch. 12. pag. 191. (c) Prec. Chanc. 54.

⁽b) Sec

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and of all other places having peculiar customs of distributing intestates' effects. So that, though in those places the reftraint of devising is removed by the statutes formerly mentioned (d), their antient customs remain in full force, with respect to the estates of intestates. I shall therefore conclude this chapter, and with it the present book, with a few remarks on those customs.

In the first place we may observe, that in the city of London (e), and province of York (f), as well as in the kingdom of Scotland (g), and therefore probably also in Wales, (concerning which there is little to be gathered, but from the statute & 8 W. III. c. 38.) the effects of the intestate, after payment of his debts, are in general divided according to the antient universal doctrine of the pars rationabilis. If the deceased leaves a widow and children, his fubstance (deducting the widow's apparel and furniture of her bed-chamber, which in London is called the widow's chamber) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the administrator: if only a widow. or only children, they shall respectively, in either case, take one moiety, and the administrator the other (h): if neither widow nor child, the administrator shall have the whole (i) And this portion, or dead man's part, the administrator was wont to apply to his own use (k), till the statute i Jac II. c 17. declared that the same should be subject to the statutes of distribution. So that if a man dies worth 1800l. leaving widow and two children, the effate shall be divided into eigh teen parts; whereof the widow shall have eight, fix by the custom and two by the statute; and each of the children five three by the custom, and two by the statute: if he leaves widow and one child, they shall each have a moiety of the whole, or nine such eighteenth parts, fix by the custom and three by the statute: if he leaves a widow and no child, the wi dow shall have three fourths of the whole, two by the custom

sifiature of diffributions expressly excepts and referrers

⁽d) page 493.
(e) Lord Raym. 1329.
(f) 2 Burs.
(g) Ibid. 782.
(h) 1 P. Wms. 341. (K) 2 Freem. 85 (9) Pr (i) 2 Show. 175. Salk. 246.

¹ Vern. 133.

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and one by the statute; and the remaining fourth shall go by the statute to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity. with regard to the custom only (1); but she shall be entitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement (m). And if any of the children are advanced by the father in his life-time with any fum of money (not amounting to their full proportionable part) they shall bring that portion into hotchpot with the rest of the brothers and fifters, but not with the widow, before they are entitled to any benefit under the custom (n): but, if they are fully advanced, the custom entitles them to no farther dividend (o).

THUS far in the main the customs of London and of York agree: but, besides certain other less material variations, there are two principal points in which they confiderably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty one; before which they cannot dispose of it by testament (p): and, if they die under that age, whether fole or married, their share hall furvive to the other children; but, after the age of twenty one, it is free from any orphanage custom, and, in case of intestacy, shall fall under the statute of distributions (q). The other, that in the province of York, the heir at common law, who inherits any lands either in fee or in tail, is excluded from any filial portion or reasonable part (r). But, notwithstanding these provincial variations, the customs appear to be substantally one and the fame. And, as a fimilar policy formerly prevailed in every part of the island, we may fairly conclude the whole to be of British original; or, if derived from the Roman law of fuccessions, to have been drawn from that fountain much earlier than the time of Justinian, from whose consti-

⁽m) 1 Vern. 15. 2 Chan. (1) 2 Vern. 665. 3 P. Wms. 16. Rep. 252. (n) 2 Freem. 279. 1 Equ. caf. abr. 155. 2 P. 341 Wms. 526. (o) 2 P. Wms. 527. (p) 2 Vern. 558.

^{85 (9)} Prec. Chan. 537. (r) Burn. 754.

constitutions in many points (particularly in the advantages given to the widow) it very confiderably differs : though it is not improbable that the relemblances which yet remain may be owing to the Roman usages; introduced in the time of Claudius Cæfar (who established a colony in Britain to instruct the natives in legal knowlege) (s) inculcated and diffused by Papinian (who presided at York as prafectus pratorio under the emperors Severus and Caracalla) (t), and continued by his fuccessors, till the final departure of the Romans in the beginning of the fifth century after Christ. di dikera beranda serahil d

(8) Tacit. Annal. I. 12, c, 32. (t) Selden, in Fletam, cap. 4. 9. 3. they me fully sel thread the cuffern one

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APPENDIX.

No. I.

Vetus Carta FEOFFAMENTI.

CIANT presentes et suturi, quod ego Willi- Premises. elmus, filius Willielmi de Segenho, dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Salesord, pro quadam summa pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mare: HABENDAM ET TENENDAM totam Habendum, and predictam acram terre, cum omnibus ejus perti- Tenendum. sentiis, prefato Johanni, et heredibus suis, et suis issignatis, de capitalibus dominis feodi: RED- Raddendum, DENDO et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta: ET ego Warranty. predictus Willielmus, et heredes mei, et mei af-Ignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignatis, conha omnes gentes warrantizabimus in perpetuum. IN CUJUS rei testimonium huic presenti carte Conclusion. igilum meum appofui: HIJS testibus, Nigello de Baleford, Johanne de Seybroke, Radulpho clerico de Saleford. Josanne molendario de eadem villa, et aliis. DATA apud Saleford de Veneris proximo ante festum sancte Margarete virginis, anno legni regis EDWARDI filii regis EDWARDI fexto. (L. S.)

MEMORANDUM, quod die et anno infracriptis plena et pacifica seisina acre infraspeciscate, cum pertinentiis, data et deliberata fuit erinfranominatum Willielmum de Segenho infraominato Johanni de Saleford, in propriis personis us, iecundum tenorem et effectum carte infra mpte, in presentia Nigelli de Saleford, Johannis e Seybroke, et aliorum. Vol. IL

Livery of feifin endorfed.

No. II.

A modern Conveyance by LEASE and RELEASE.

§. I. LEASE, or BARGAIN and SALE, for a year.

THIS INDENTURE, made the third day of Premises. September, in the twenty-first year of the reign of our fovereign lord GEORGE the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty seven, between Abraham Barker Parties. of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife, of the one part, and David Edwards of Lincoln's Inn in the county of Middlefex, esquire, and Francis Golding of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker and Consideration. Cecilia his wife, in confideration of five thillings of lawful money of Great Britain to them in hand paid by the faid David Edwards and Francis Golding at or before the ensealing and delivery of these presents, (the receipt whereof is hereby aeknowleged,) and for other good causes and considerations them the faid Abraham Barker, and Cecilia his wife hereunto Bargain and Sale. specially moving, HAVE bargained and fold, and by these presents do, and each of them doth, bargain and fell, unto the faid David Edwards and Francis Golding, their executors, administrators, and affigns, ALL Parcels. that the capital messuage, called Dale Hall in the parish of Dale in the said county of Norfolk, wherein the faid Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale, called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dovehouses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourfes, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatfoever to the faid capital meffuage and farm belonging or appertaining, or with the fame used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; and the reversion and reversions, remainder and remainders yearly and other rents, iffues, and profits thereof, and of every part and parcel thereof: TO HAVE AND TO HOLD the

parcel thereof: TO HAVE AND TO HOLD the faid capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein before mentioned or intended to be bargained and sold, and every

every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the faid David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of, one whole year from thence next enfuing and fully to be complete and ended: YIELDING and paying therefore unto the faid Reddendum. Abraham Barker, and Cecilia his wife, and their heirs and affigns, the yearly rent of one pepper-corn at the expiration of the faid term, if the same shall be lawfully demanded: TO THE INTENT and purpose, that Intent. by cirtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premiles, and of every part and parcel thereof, to them, their heirs and affigns; to the uses, and upon the trufts, thereof to be declared by another indenture, intended to bear date the day next after the day of the date hereof. IN WITNESS whereof the parties to Conclusion. these presents their hands and seals have subscribed and fet, the day and year first abovewritten.

Sealed, and delivered, being first duly stamped, in the presence of George Carter.
William Brown.

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Abraham Barker. (L. S.) Cecilia Barker. (L. S.) David Edwards. (L. S.) Francis Golding. (L. S.)

§. 2. Deed of RELEASE.

THIS INDENTURE of five parts, made the Premises. fourth day of September, in the twenty-first year of the reign of our fovereign lo d GEORGE the fecond by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty-seven, betw en Abraham Barker, of Dale H ll in the county of Norfok, ef-Parties. quire, and Cecilia his wife, of the first part; David Edwards of Lincoln's Inn in the county of Middlefex, esquire, executor of the last will and testament of Lew's Edwards, of Cowbridge in the county of Glamorgan, gentleman, his late father deceased, and Francis Golding of the city of Norwich, clerk, of the second part; Charles Browne of Enstone in the county of Oxford, gentleman, and Richard More of the city of Briltol, merchant, of the third part; John Barker, esquire, son and heir apparent of the faid Abraham Barker, of the fourth part; and Katherine Edwards, spinster, one of the sisters of the said David . Z 2

Recital.

Confideration.

Edwards, of the fifth part. WHEREAS a marriage is intended, by the permission of God, to be shortly had and solemnized between the said John Barker and Katherine Edwards: NOW THIS INDENTURE WITNESSETH, that in considera-

tion of the faid intended marriage, and of the fum of five thousand pounds, of good and lawful money of Great Britain, to the faid Abraham Barker, (by and with the confent and agreement of the faid John Barker, and Katherine Edwards, testified by their being parcies to, and their fealing and delivery of, thefe prefents,) by the faid David Edwards in hand paid at or before the enfealing and delivery hereof, being the marriage portion of the faid Katherine Edwards, bequeathed to her by the last will and tessament of the said Lewis Edwards, her late father, deceased the receipt and payment whereof the faid Abraham Barker doth hereby acknowlege, and thereof, and of every part and parcel thereof, they the faid Abraham Barker, John Barker, and Katherine Edwards, do, and each of them doth, release, acquit, and discharge the said David Edwards, his executors, and administrators, for ever by these presents; and for providing a competent jointure and provision of maintenance for the faid Katherine Edwards, in case the shall, after the said intended marriage had, furvive and overlive the faid John Barker her intended husband; and for fettling and affuring the capital meffuage, lands, tenements, and hereditaments, hereinafter mentioned, unto such uses, and upon such trufts, as are hereinafter expressed and declared; and for and in confideration of the fum of five hillings of lawful money of Great Britain, to the faid Abraham Barker and Cecilia his wife in hand paid by the faid David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard More, at or before the enfealing and delivery hereof,

Releafe.

(the feveral receipts whereof are hereby respectively acknowleded,) they the said Abraham Barker and Cecilia his wife, HAVE, and each of them

hath granted, bargained, fold, released, and confirmed, and by these presents do, and each of them doth, grant, bargain, sell, release, and confirm unto the said David Edwards and Parcels.

Francis Golding, their heirs and assigns, ALL that

the capital messuage called Dale Hall in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wise now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dovehouses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, sishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging

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ing to the same or any part thereof; (all which said premises are now in the actual possession of the faid David Edwards and Francis Gold-

ing, by virtue of a bargain and fale to them thereof made to the faid Abraham Barker and Cecilia his Mention of barwife for one whole year, in confideration of five gain and fale.

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shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession;) and the reversion and reversions, remainder and remainders, yearly and other rents, iffues, and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoeboth at law and in equity, of them the faid Abraham Barker, and Cecilia his wife, in, to, or out of, the faid capital messuage,

lands, tenements, hereditaments, and premises: TO HAVE AND TO HOLD the faid capital mef- Habendum.

fuages, lands, tenements, hereditaments, and all and fingular other the premises herein beforementioned to be hereby granted and released, with their and every of their appurtenances, unto the faid David Edwards and Francis Colding, their heirs and affigns, to fuch uses, upon such trusts, and to and for such intents and purpofes as are hereinafter mentioned, expressed, and declared, of and

concerning the same: that is to say, to the use and behoof of the faid Abraham Barker, and Cecilia his wife, according to their feveral and respective estate and interests therein, at the time of, or immediately before, the execution of these presents.

until the folemnization of the faid intended marriage: and from and after the folemnization thereof, to the use and behoof of the said

John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the faid John Barker, upon the trust to support and preserve the contingent uses and estates hereinaster limited from being defeated and destroyed, and for that purpose to make entries

or bring actions, as the case shall require; but nevertheless to permit and fuffer the faid John Barker, and his affigns, during his life, to receive and take the rents and profits thereof, and of every part

thereof, to and for his and their own use and benefit: and from and after the decease of the said John Barker, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and

thirds at common law, which she can or may have or claim, of, in to, or out of, all, and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the faid John Barker now is, or

Remainder to

the wife for life, for her jointure, in bar of dower.

at any time or times hereafter during the coverture between them shall be, seised of any estate of freehold or inheritance; and from and after the decease of the said Katherine Edwards, or other sooner determination of the said estate, then to the use and behoof of the said Charles Browne and Richard More, their executors, administrators,

Remainder to other trustees for a term, upon trusts after mentioned:

Remainder to the first and other fons of the marriage in tail: and assigns, for and during, and unto the full end and term, of five hundred years from thence next ensuing and fully to be complete and ended, without impeachment of waste; upon such trusts nevertheless, and to and for such intents and purposes, and under and subject to such provisoes and agreements, as are hereinaster mentioned, expressed, and declared of and concerning the same: and from and after the end, expiration, or other sooner determination of the said term of sive hundred years, and subject thereunto, to the use and behoof of the first son of the said John Barker on the

body of the faid Katherine Edwards his intended whe to be begotten, and of the heirs of the body of fuch first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age, and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing: and for default of such issue, then

Remainder to

as tenants in common, in tail.

as tenants in common and not as joint-tenants, and of the feveral and respect we heirs of the body and bodies of all and every such daughter and daughters lawfully issuing: and for default

Remainder to the hufband's mother in fee. The trust of the term declared: ter and daughters lawfully iffuing: and for default of fach iffue, then to the use and behoof of the heirs of the body of him the said John Barker lawfully iffuing: and for default of such heirs, then to the use and behoof of the said Cecilia, the wife of the said Abraham Barker, and of her heirs and assigns for ever. AND as to, for, and concerning the term of sive hundred years herein before limited

to the use and behoof of all and every the daughter

and daughters of the faid John Barker on the body

of the faid Katherine Edwards his intended wife to be begetten, to be equally divided between

them, (it more than one,) share and share alike,

to the faid Charles Browne and Richard More, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes and agreements, hereinaster

hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, in case there shall be an eldest or only son and one more or other child or children of the said John Barker, on the body of the said Katherine, his intended wife to be begotten, then upon trust that the laid Charles Browne and Richard More, their executors, administrators, and affigns, by sale or mortgage of the faid term of five hundred years, or by fuch

other ways and means as they or the furvivor of to raise portions them, or the executors or administrators of such for younger chilfurvivor shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four

the usand pounds of lawful money of Great Britain, for the portion or portions of fuch other child and children (besides the eldest or only fon) as aforefaid, to be equally divided between them (if more than

one) share and share alike; the portion or portions of fuch of them as shall be a fon or fons to be paid payable at cerat his or their respective age or ages of twenty-one

years: and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty one years, or day or days of marriage,

which shall first happen. And upon this further trust, that in the mean time and until the same with mainteportions shall become payable as aforesaid, the faid nance at the rate

Charles Browne and Richard More, their execu- of 4 per cent. tors, administrators, and affigns, shall and do, by

and out of the rents, iffues, and profits of the premises aforesaid, raise and levy fuch competent yearly fum and fums of money for the maintenance and education of fuch child or children, a shall not exceed in the whole the interest of their respective portions after the rate of

four pounds in the hundred yearly. PROVIDED always, that in case any of the same children shall happen to die before his, her, or their portions shall survivorship. become payable as aforefaid, then the portion or

portions of fuch of them to dying shall go and be paid unto and be equally divided among the furvivor or furvivors of them, when and at fuch time as the original portion or portions of fuch furviving child or children shall become payable as aforesaid.

PROVIDED also, that in case there shall be no If no such child, fuch child or children of the faid John Barker on the body of his faid intended wife begotten, besides an eldest or only fon; or in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or in case the said portions, and also such mainte- or if the portinance as aforefaid, shall by the faid Charles Browne ons be raifed, and Richard More, their executors, administrators,

or affigns, be raifed and levied by any of the ways and means in that behalf aforementioned; or in case the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of

five hundred years, shall be paid, or well and duly or paid, Z 4

tain times,

and benefit of

or if all die,

fecured

or fecured by the person next in remainder; the residue of the term to cease.

Condition, that the uses and estates hereby granted shall be void, on settling other lands of equal value in recompense.

fecured to be paid, according to the true intent and meaning of these presents; then and in any of the faid cases, and at all times thenceforth, the said term of five hundred years, or fo much thereof as shall remain unfold or undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purpofes, any thing herein contained to the contrary thereof in any wife notwithstanding. PROVIDED also, and it is hereby further declared and agreed by and between all the faid parties to these presents, that in case the faid Abraham Barker or Cecilia his wife, at any time during their lives, or the life of the furvivor of them, with the approbation of the faid David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such

furvivor, shall fettle, convey, and affure other lands and tenements of an effate of inheritance in fee-simple in possession, in some convenient place or places within the realm of England, of equal or better value than the faid capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, and in lieu, and recompense thereof, unto and for such and the like uses, intents, and purposes, and upon such and the like trusts, as the said capital mesluage, lands, tenements, hereditaments, and premises, are hereby fettled and affured unto and upon, then and in fuch case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates herein before limited, expressed, and declared of or concerning the fame, shall cease, determine, and be utterly void to all intents and purposes; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from thenceforth remain and be to and for the only proper use and behoof of the said Abraham Barker or Cecilia his wife, or the survivor of them, so settling, conveying, and affuring such other lands and tenements as aforefaid, and of his or her heirs and affigns for ever; and to and for no other use, intent, or purpose whatsoever; any thing herein con-

Covenant to levy a fine. tained to the contrary thereof in any wife notwithflanding. AND, for the confiderations aforefaid, and for barring all estates tail, and all remainders and reversions expectant and depending, if any be

now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any part thereof, the said Abraham Barker for himself and the said Cecilia his wise, his and her heirs, executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do, and each of them doth, respectively covenant, promise, and grant, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they the said Abraham Barker and Cecilia his wise, and John Barker, shall and will

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will, at the costs and charges of the said Abraham Barker, before the end of Michaelmus term next enfuing the date hereof, acknowlege and levy, before his majesty's justices of the court of common pleas at Weltminster, one or more fine or fines, fur cognizance de droit, come ceo, &c. with proclamations according to the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the faid capital messuage, lands, tenements, hereditaments, and premifes, by fuch apt and convenient names, quantities, qualities, number of acres and other descriptions to ascertain the same, as shall be thought meet: which said fine or fines, so as aforesaid or in any other manner levied and acknowleged, or to be levied and acknowleged, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended to be and enure, and are hereby declared by all the faid parties to these presents to be and enure, to the use and behoof of the said David Edwards, and his heirs and affigns; to the intent and purpose that the said David Edwards may, by virtue of the said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the faid capital messuage, lands,

tenements, hereditaments, and all other the pre- in order to make mifes, to the end that one or more good and perfect a tenant to the common recovery or recoveries may be thereof had praecipe, and fuffered, in such manner as is herein after for that purpose mentioned. And it is hereby de-

clared and agreed by and between all the faid par-

that a recovery

may be suffered;

ties to these prefents, that it shall and may be lawful to and for the faid Francis Golding, at the costs and charges of the faid Abraham Barker, before the end of Michaelmas term next enfuing the date hereof, to sue forth and prosecute out of his majesty's high court of chancery one more writ or writs of entry fur diffeisin en le post, returnable before his majesty's justices of the court of common pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other descriptions, the faid capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ, or writs of entry, he the faid David Edwards shall appear gratis, either in his own proper person, or by his attorney thereto lawfully authorized, and vouch over to warranty the faid Abraham Barker, and Cecilia his wife, and John Barker; who shall also gratis appear in their proper persons, or by their attorney or attorneys, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear, and after imparlance shall make default; so as judgment shall and may be thereupon had and given for the faid Francis Golding, to recover the faid capital meffuage, lands, tenements, hereditaments, and premiles, against the said David Edwards, and for him to recover in value against the said Abraham Barker, and Cecilia his wife, and John Barker, and for them to recover in value against the said common Z 5

vouchee, and that execution shall and may be thereupon awarded and had accordingly, and all and every other act and thing be done and executed, needful and requifite for the fuffering and perfecting of fuch common recovery or recoveries, with vouchers as afgresaid.

And it is here by further declared and agreed by and between all the faid parties to these presents, that to enure immediately from and after the fuffering and per-

feeling of the faid recovery or recoveries, so as aforefaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the faid fine or fines to covenanted to be levied as aforefaid, as also the faid recovery or recoveries, and also all and every other fine and fines. recovery and recoveries, conveyances, and affurances in the law whatfoever heretofore had, made, levied, suffered, or executed, or hereafter to be had, made, levied, fuffered, or executed, of the faid capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part the eof, by and between the said parties to these presents or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended to be and enure, and the recoveror or recoverors in the faid recovery or recoveries named or to be named; and his or their heirs, shall stand and be seised of the said capital messuage, lands, tenements,

to the preceding usesin this deed.

Other covemants;

ment,

ree from incumbrances; hereditaments, and premises, and of every part and parcel thereof, to the uses, upon the trusts, and to and for the intents and purposes, and under and fubject to the providoes, limitations, and agree-

ments, herein before-mentioned, expressed, and declared, of and concerning the fame. AND the faid Abraham Barker, party hereunto, doth hereby for himfelf, his heirs, executors, and administrators, further covenant, promife, grant, and agree, to and with the faid David Edwards and Francis Golding, their heirs, executors,

and administrators, in manner and form following; for quiet enjoy- what is to fay, that the faid capital meffuage, lands, tenements, hereditaments, and premises, shall and may, at all times hereafter, remain, continue, and be, to and for the uses and purposes, upon the trusts, and under

and fubject to the provisoes, limitations, and agreements, herein before-mentioned, expressed, and declared, of and concerning the fame; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any I wful let or interruption of or by the laid Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs, or affigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under his or her ancestors, or any of them; and shall so remain, continue,

and he. free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the faid Abraham Barker, or Cecilia his wife,

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parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all former and other gifts, grants, bargains, fales, leafes, mortgages, estates, titles, troubles, charges, and incumbrances whatfoever, had, made done, committed, occasioned, or fuffered, by the said Abraham Barker, or Cecilia his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their act, means, affent, confent, or procurement :

AND MOREOVER that he the faid Abraham and for further Barker, and Cecilia his wife, parties hereunto, affurance.

and his and her heirs, and all other persons hav-

ing or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law, or in equity, of, in, to, or out of, the faid capital meffuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under, his or her ancestors or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges, of the said David Edwards. and Francis Golding, or either of them, their or either of their heirs. executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all fuch further and other lawful and reasonable acts, deeds, conveyances, and assurances, in the law whatfoever, for the further, better, more perfect, and absolute granting, conveying, fettling, and affuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon trusts, and under and subject to the provifoes, limitations, and agreements, herein before-mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law shall be reasonably advised, devised, or required: fo as such further assurances contain in them no further or other warranty or covenants than against the person or persons. his, her, or their heirs, who shall make or do the same; and so as the party or parties, who shall be requested to make such further affurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. PRO-VIDED LASTLY, and it is bereby further de-

Power of revoclared and agreed by and between all the parties to cation.

these presents, that it shall and may be lawful to

and for the faid Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals and attested by two or more credible witnesses, to revoke, make void, alter, or change all and every or any the use and uses, estate and estates, herein and hereby

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hereby before limited and declared, or mentioned or intended to be limited and declared, of and in the capital meffuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel thereof, and to declare new and other uses of the same, or of any part or parcel thereof, any thing herein contained to the con-

trary thereof in any wife notwithstanding. IN WITNESS WHEREOF the parties to these pre-Conclusion. fents their hands and feals have subscribed and fet.

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whose firming may be as seem buy as the size of the firm of the seek

and one of the contract of the second second and a second and enterly when the re in the other make we are a second enterly and the state of t

the day and year first above-written.

Sealed, and delivered, being first duly stamped, in the presence of

Abraham Barker. (L. S.) Cecilia Barker. (L.S.). David Edwards. (L. S.) George Carter.

David Edwards. (L. S.)

Francis Golding. (L. S.) William Browne, Charles Browne, (L. S) Richard More. (L. S.) Tohn Barker. (L. S.) Katherine Edwards, (L. S.) And will a sure of the first

The or he had the bitered well and the real of the best and the the and the second of the second second restriction and second second

No. III.

An OBLIGATION, or BOND, with CONDITION for the payment of meney.

NOW ALL MEN by these presents, that I David Edwards, of Lincoln's Inn in the county of Middlesex, esquire, and held and firmly bound to Abraham Barker of Dale-Hall in the county of Norsolk, esquire, in ten thousand pounds of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty-first year of the reign of our sovereign lord George the second by the grace of God king of Great-Britain, France, and Ireland, desender of the saith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty-seven.

THE CONDITION of this obligation is such, that if the above bounded David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the abovenamed Abraham Barker, his executors, administrators, or assigns, the full such of sive thousand pounds of lawful British money, with lawful interest for the same, on the sourch day of March next ensuring the date of the above-written obligation, then this obligation shall be void and of none effect, or else shall be and remain in sull

force and virtue.

II.

Sealed, and delivered, being first duly stamped, in the presence of George Carter.
William Browne.

David Edwards. (L. S.)

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No. IV.

AFINE of Lands, fur Cognizance de Droit, come ceo, &c.

§ 1. Writ of Covenant; or PRAECIPE.

France, and Ireland king, defender of the faith, and so forth; to the sheriff of Norfolk, greeting. COMMAND Abraham Barker, esquire, and Cecilia his wise, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices, at Westminster, from the day of saint Michael in one month, to shew wherefore they have not done it; and have you there the summoners, and this writ. WITNESS ourself at Westminster, the ninth day of October, in the twenty-first year of our reign.

Sheriff's return,

Pledges of John Doe. profecution, Richard Roe.

Summoners of the within named Abra-ham, Cecilia and John. Richard Fen.

§. 2. The Licence to agree.

Norfolk, 3 DAVID EDWARDS, esquire, gives to the lord the to wit. 3 king ten marks, for licence to agree with Abraham Barker, esquire, of a plea of covenant of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and sifty acres of wood, with the appurtenances, in Dale.

§. 3. The Concord.

AND THE AGREEMENT IS SUCH, to wit, that the aforesaid Arraham, Cecilia, and John, have acknowledged the aforesaid tenements.

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oreefaid ents, tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the afore-said Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§. 4. The Note, or Abstract.

Norfolk, SBETWEEN David Edwards, esquire, complainant, to wit. 2 and Abraham Barker, esquire, and Cecilia his wife, and John Barker, elquire, deforciants, of two melfuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the apportenances, in Dale, whereupon a plea of covenant was summoned between them; to wit, that the faid Abraham, Cecilia, and John, have acknowleged the aforefaid tenements, with the appurtenances, be the right of him the faid David, as those which the faid David hath of the gift of the aforesaid Abraham, Cecilia, and John; and hose they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the fame Abraham, Cecilia, and John, have granted for themselves, and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the faid David hath given to the aid Abraham, Cecilia, and John, two hundred pounds sterling.

S. s. The Foot, Chirograph, or Indentures, of the FINE.

Norfolk, THIS IS THE FINAL AGREEMENT, made in the to wit. Scourt of the lord the king at Wettminster, from the day of saint Michael in one month, in the twenty-first year of the reign of the lord George the second by the grace of God of Great Britain, France, and Ireland king, defender of the saith, and so forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful subjects of the lord the king then there present, between David Edwards, esquire, complainant, and Abraham

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Abraham Barker, esquire, and Cecilia his wife, and John Barke esquire, deforciants, of two messuages, two gardens, three hu dred acres of land, one hundred acres of meadow, two hundred acre of pasture, and fifty acres of wood, with the appurtenances, Dale, whereupon a plea of covenant was furnmoned between the in the faid court; to wit, that the aforefaid Abraham, Cecili and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the faid David, as those which the faid David hath of the gift of the aforefaid Abraham, Cecili and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for eve And further, the same Abraham, Cecilia, and John, have grante for themselves and their heirs, that they will warrant to the afort faid David and his heirs, the aforesaid tenements, with the appurt nances, against all men for ever. And for this recognition, remis quit-claim, warranty, fine, and agreement, the faid David ha given to the faid Abraham, Cecilia, and John, two hundred poun sterling.

5. 6. Proclamations, endorfed on the FINE, according to the Statutes.

THE FIRST proclamation was made the fixteenth day of November, in the term of faint Michael, in the twenty first year of the king within written.

THE SECOND proclamation was made the fourth day of February, in the term of faint Hilary, in the twenty first year of the king within written.

THE THIRD proclamation was made the thirteenth day of May, in the term of Easter, in the twenty first year of the king within written.

THE FOURTH proclamation was made the twenty-eighth day of Pleasure, in the term of Holy Trinity, in the twenty second year of the king within written.



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No. V.

A common RECOVERY of Lands, with # double Voucher.

6. 1. Writ of entry fur Diffeifin in the Poft; or PRAECIPE.

YEORGE the second by the grace of God of Great-Britain, T France, and Ireland king, defender of the faith, and fo forth; to the theriff of Norfolk, Greeting. COMMAND David Edwards, esquire, that justly and without delay he render to Francis Golding, clerk, two meffuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the faid David hath not entry, unless after the diffeifin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforefaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And unless he shall so do, and if the faid Francis shall give you fecurity of profecuting his claim, then fummon by good fummoners the faid David, that he appear before our justices at Westminster, on the octave of saint Marin, to shew whereof he hath not done it; and have you there the summoners, and this writ. WITNESS ourself at Westminster, the twenty-ninth day of October, in the twenty-first year of our reign.

Sheriff's return.

lay of Pledges of S John Doc. if the profecution, 2 Richard Roe. within named David, 2 Richard Fen.

Summoners of the f John Den.

6. 2. Exemplification of the RECOVERY Roll.

GEORGE the second by the grace of God of Great Britain, france, and Ireland king, defender of the faith, and fo forth; to all whom these our present letters shall come, greeting. KNOW IE, that among the plays of land, enrolled at Westminster, before Ir John Willes, knight, and his fellows, our justices of the bench, the term of faint Michael, in the twenty-first year of our reign, pon the fifty second roll it is thus contained. MTRY returnable on the octave of faint Martin. Return.

NORFOLK.

No. 1 Note, that if the recovery be had with fingle voucher, the parts sarked " thus" in §. 2. are omitted.

No

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the tenant.

Demand against NORFOLK, to wit; Francis Golding, clerk, in his proper person demandeth against David Ed. wards, esquire, two messuages, two gardens, three

hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the faid David hath not entry, unless after the diffeifin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforefaid Francis, within

Count.

Esplees.

faith, that he himfelf was feited of the tenements for aforelaid, with the appurtenances, in his demesse not as of fee and right, in time of peace, in the time out of the lord the king that now is, by taking there-

thirty years now last past. And whereupon he

of to the value [* of fix shillings and eight pence, and more, in rents, ecorn, and grats:] and into which [the said David hath not entry, unless as aforesaid:] and thereupon he bringeth suit, [and good proof.] AND the said David in his proper person comes and defendeth his right, when [and where it shall behove him,] and therewhere when [and where it shall behove him]. who is present here in court in his proper person, wr and the tenements aforesaid with the appurtenances to him freely warranteth, [and prays that the said Francis may count against one

Demandagainst " the vouchee. " Count.

"mandeth against the said John, tenant by his own slay arranty, the tenements aforesaid, with the aposition of the same state of the same

"purtenances, in form aforesaid, &c. And where upon he saith, that he himself was seised of the selftenements aforesaid, with the appurtenances, in his demesse as of the selftenements aforesaid, with the appurtenances, in his demesse as of the selftenements aforesaid, with the appurtenances, in his demesse as of the selftenements aforesaid, with the appurtenances, in form aforesaid, &c. And where the selftenements aforesaid, with the appurtenances, in the simple selftenements aforesaid, with the appurtenances, in the selftenements aforesaid, with the selftenements aforesaid,

tenements aforelaid, with the apaurienances, in form aforesaid, &c. And whereupon he saith, that he himself was feiled of the tenements aforefaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the va-

lue, &c. And into which, &c. And thereupon he bringeth suit, &c. AND the aforesaid Jacob, te-Defence of the nant by his own warranty, defends his right, when, common vouchee.

* The clauses, between hooks, are no otherwise expressed in the record than by an &c.

inself es, 11 ne of ne vaon he b, tewhen,

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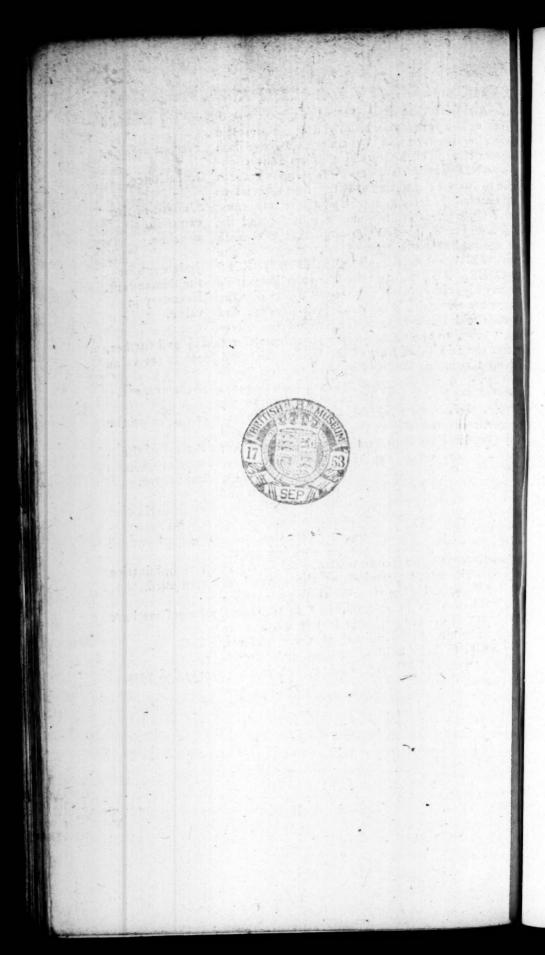
&c. And faith that the aforesaid Hugh did not diffeise the aforesaid

francis of the tenements aforefaid, as the aforefaid prancis by his writ and count aforefaid above doth appofe; and of this he puts himself upon the country. AND the aforefaid Francis thereupon eraveth the aforefaid Francis cometh again here into court the this fame term in his proper person; and the soft again, but hath departed in contempt of the me bort, and maketh default. THEREFORE IT Judgment for the SCONSIDERED, that the aforefaid Francis do to the the faid David have of the land of the aforefaid to the faid "John, to the value [of the tenements aforefaid," it that the said John, have of the land of the said Jacob to the value in mercy. AND hereupon the said Francis prays on writ of the lord the king, to be directed to the set with of the country aforesaid, to cause him to have said meements aforesaid with the appurtenances: and the said granted unto him, returnable here without also they virtue of the writ aforesaid to him directed, on the said Francis in his proper person; and the sheriff, namely, fir Charles Thompson, knight, now sendeth, that is to say, the twenty-the unth day of the same month, did cause the said Francis to have full so by virtue of the writ aforesaid with the appurtenances, as he was commanded. ALL AND the sames, as he was commanded. ALL AND we held good to be exemplished. In testimony whereof we have not assert the with most asserted to be exemplished. In testimony whereof we have not asserted to the same with the asserted to the same with most asserted to the server serv francis of the tenements aforefaid, as the aforefaid francis by his writ and count aforefaid above doth

s, in

Cooke.

Plea, nul diffei fin.



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